

3-17-2016

Forbush v. Sagecrest Multi Family Clerk's Record Dckt. 44053

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE FIRST
CLASS MCQUEN C. FORBUSH, USMC (Deceased), and
BREANNA HALOWELL,

Plaintiffs-Appellants,

vs.

SAGECREST MULTI FAMILY PROPERTY OWNERS'
ASSOCIATION, INC., and JON KALSBECK, individually
and as President of the Sagecrest Multi Family Property
Owners' Association,

Defendants-Respondents,

and

JAY ARLA, individually and as vice president of the
Sagecrest Multi Family Property Owners' Association;
CHRIS SCHWAB, individually and as secretary of the
Sagecrest Multi Family Property Owners' Association;
DAVID MEISNER, individually and as treasurer of the
Sagecrest Multi Family Property Owners' Association;
FIRST RATE PROPERTY MANAGEMENT, INC., TONY
DROST, individually and as president of First Rate Property
Management, Inc.; SAGECREST DEVELOPMENT, LLC;
PARK CENTER PLUMBING, INC., nka PC PLUMBING,
INC.; WIDGEON MECHANICAL, LLC, nka IDAHO
GEOTHERMAL, LLC; A. O. SMITH, INC.; MATTHEW
E. SWITZER TRUST, and MATTHEW E. SWITZER,
individually and as Trustee of the Matthew E. Switzer Trust;
GOODMAN MANUFACTURING COMPANY, LP;
ANFINSON PLUMBING, LLP; DANIEL BAKKEN,
individually and as employee of Anfinson Plumbing, LLP;
H&H PROPERTIES, LLC; and INTERMOUNTAIN GAS
COMPANY,

Defendants.

Supreme Court Case No. 44053

CLERK'S RECORD ON APPEAL

000001

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE CHERI C. COPSEY

CHARLES F. PETERSON, JR.

ATTORNEY FOR APPELLANT

BOISE, IDAHO

MICHAEL J. ELIA

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

JOHN M. HOWELL

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Date	Code	User		Judge
3/7/2013	NCOC	MCBIEHKJ	New Case Filed - Other Claims	Cheri C. Copsey
	COMP	MCBIEHKJ	Complaint Filed	Cheri C. Copsey
	SMFI	MCBIEHKJ	Summons Filed	Cheri C. Copsey
3/8/2013	AMCO	CCHEATJL	Amended Complaint and Demand For Jury Trial Filed	Cheri C. Copsey
	SMFI	CCHEATJL	Another Summons Filed	Cheri C. Copsey
3/12/2013	MOTN	CCPINKCN	Ex Parte Motion for Order Authorizing Personal Service Outside the State of Idaho	Cheri C. Copsey
	AFSM	CCPINKCN	Affidavit In Support Of Ex Parte Motion for Order Authorizing Personal Service Outside the State of Idaho	Cheri C. Copsey
3/13/2013	AFFD	CCBOYIDR	Affidavit of Acceptance of Service of Process (3-8-13) First Rate Property Management and Tony Drost	Cheri C. Copsey
3/14/2013	NOTS	CCHEATJL	Notice Of Service Of Plaintiffs' First Set Of Discovery To Defendants First Rate Property Management And Tony Drost	Cheri C. Copsey
	NOAP	CCPINKCN	Notice Of Appearance (Michael Haman for Matthew Switzer Trustee for Matthew Switzer)	Cheri C. Copsey
	ACCP	CCPINKCN	Acceptance Of Service (03/12/13)	Cheri C. Copsey
	ACCP	CCMEYEAR	Acceptance Of Service (03/14/2013)	Cheri C. Copsey
	AFFD	CCDEREDL	Affidavit of Acceptance of Service	Cheri C. Copsey
3/15/2013	ORDR	CCMASTLW	Order for Personal Service Outside State of Idaho	Cheri C. Copsey
3/20/2013	NOTS	CCKHAMSA	Notice Of Service	Cheri C. Copsey
3/21/2013	NOTS	CCHEATJL	Notice Of Service Of Plaintiffs' First Set Of Discovery To Defendant Matthew E Switzer, Trust, And Matthew E Switzer	Cheri C. Copsey
	ADJT	CCSWEECE	Defendant Switzer's Answer And Demand For Jury Trial (Michael Haman for Matthew Switzer Trust, Matthew E Switzer, and Matthew E Switzer Trustee)	Cheri C. Copsey
	NOTS	CCSWEECE	Notice Of Service	Cheri C. Copsey
	NOTS	CCDEREDL	Notice Of Service	Cheri C. Copsey
4/1/2013	MOTD	CCMEYEAR	Motion To Dismiss (D Knotts for Widgeon Mechanical LLC)	Cheri C. Copsey
	AFFD	CCMEYEAR	Affidavit of Jason Fuller Re: Motion to Dismiss	Cheri C. Copsey
4/2/2013	NOAP	CCSWEECE	Notice Of Appearance (Robert A Anderson for First Rate Property Management Inc and Tony Drost)	Cheri C. Copsey
4/3/2013	RESP	MCBIEHKJ	Response To Motion to Dismiss	Cheri C. Copsey
	AFFD	MCBIEHKJ	Affidavit in Support of Response to Motion to Dismiss	Cheri C. Copsey
4/4/2013	HRSC	CCHEATJL	Notice Of Hearing Scheduled (Hearing Scheduled 05/23/2013 03:30 PM)	Cheri C. Copsey

Date	Code	User	Judge
4/9/2013	MOTN	CCKHAMSA	Motion For Limited Admission Pro Hac Vice For Mark L. Tripp Cheri C. Copsey
	MOTN	CCKHAMSA	Motion For Limited Admission Pro Hac Vice For Jason C. Palmer Cheri C. Copsey
4/10/2013	ORDR	CCMASTLW	Order for Limited Admission Pro Hac Vice - Mark L. Tripp Cheri C. Copsey
	ORDR	CCMASTLW	Order for Limited Admission Pro Hac Vice - Jason C. Palmer Cheri C. Copsey
	ANSW	MCBIEHKJ	Answer to Amended Complaint (N Crawford for Park Center Plumbing) Cheri C. Copsey
4/11/2013	NOTS	CCSWEECE	Notice Of Service of Discovery Cheri C. Copsey
4/15/2013	NOTC	CCMEYEAR	Notice of Intent Cheri C. Copsey
4/18/2013	NOAP	CCMEYEAR	Notice Of Appearance (M Elia for Sagecrest Multi-Family Property Owners Association Inc, Jon Kalsbeek, Jay Arla, Chris Schwab and David Meisner) Cheri C. Copsey
	NOAP	CCOSBODK	Notice Of Appearance (Greener For Goodman Manufacturing Company LP) Cheri C. Copsey
4/19/2013	MEMO	TCLAFFSD	Memorandum In Support Of Motion To Dismiss Cheri C. Copsey
4/23/2013	ANSW	CCMEYEAR	AO Smith Inc's Answer to Amended Complaint and Demand for Jury Trial Cheri C. Copsey
	ANSW	CCVIDASL	Sagecrest Development LLCs Answer to Plaintiffs Amended Complaint and Demand for Jury Trial (McColl for Sagecrest Development LLC) Cheri C. Copsey
4/25/2013	MOTN	TCLAFFSD	Defendant Sagecrest Development, LLC's Motion To Dismiss Cheri C. Copsey
	MEMO	TCLAFFSD	Defendant Sagecrest Development, LLC's Memorandum In Support Of Its Motion To Dismiss Cheri C. Copsey
	NOTH	TCLAFFSD	Notice Of Hearing Re: Defendant Sagecrest Development, LLC's Motion To Dismiss (05/23/2013 03:30 PM) Cheri C. Copsey
4/26/2013	NOTS	CCMEYEAR	Notice Of Service Cheri C. Copsey
4/30/2013	MOTN	CCHEATJL	Defendant Goodman Manufacturing Company LP's Ex Parte Motion To Enlarge TTime In Which To Answer Amended Complaint Cheri C. Copsey
	AFSM	CCHEATJL	Affidavit Of Clinton S Coddington In Support Of Defendant Goodman Manufacturing Company LP's Ex Parte Motion To Enlarge TTime In Which To Answer Amended Complaint Cheri C. Copsey
	NOTC	CCMARTJD	Notice of Non Objection to Motion to Enlarge Time Cheri C. Copsey
5/1/2013	NOTS	TCLAFFSD	Notice Of Service Of Plaintiffs' First Set Of Discovery To Defendant Goodman Manufacturing, LP Cheri C. Copsey

Date	Code	User	Judge
5/2/2013	ANSW	CCTHIEKJ	Defendants Sagecrest Multi-Family Property Owners' Association, Inc., Jon Kalsbeek, Jay Arla, Christopher Schwab, and David Meisner's Answer to Plaintiffs Amended Complaint and Demand for Jury Trial
5/3/2013	ORDR	CCMASTLW	Order Granting Goodman Mfg Co's Ex Parte Motion to Enlarge Time to File Answer
	NOTS	CCOSBODK	(2) Notice Of Service
5/7/2013	ANSW	CCREIDMA	Answer To Amended Complaint And Demand For Jury Trial
5/9/2013	NOTS	CCHEATJL	Notice Of Service
5/10/2013	NOTS	CCMEYEAR	Notice Of Service
5/13/2013	NOTS	MCBIEHKJ	Notice Of Service
5/15/2013	NOTS	MCBIEHKJ	Notice Of Service
5/16/2013	RPLY	CCHEATJL	Plaintiff's Reply Brief In Response To Motion To Dismiss Filed By Idaho Geothermal LLC Sagecrest Development Inc And PC Plumbing
	OBJE	CCSCOTDL	Objection to Plaintiffs Reply Brief
	NOTS	MCBIEHKJ	Notice Of Service
5/17/2013	REPL	MCBIEHKJ	Reply to Objection to Reply Brief
	HRVC	CCMASTLW	Hearing result for Hearing Scheduled scheduled on 05/23/2013 03:30 PM: Hearing Vacated Motion To Dismiss
	NOTC	CCHEATJL	Notice Of Vacating Hearing
5/21/2013	NOHG	CCMASTLW	Amended Notice Of Hearing
	HRSC	CCMASTLW	Hearing Scheduled (Motion to Dismiss 07/11/2013 03:30 PM)
	ORDR	CCMASTLW	Stipulated Protective Order
	AMEN	CCSWEECE	Amended Notice Of Hearing (July 11, 2013 @ 3:30 PM Motion to Dismiss)
5/22/2013	NOTS	CCOSBODK	Notice Of Service
	MOSJ	CCHOLMEE	Defendant Park Center Plumbing's Motion For Summary Judgment
	AFFD	CCHOLMEE	Affidavit of Raul Castanon
	MEMO	CCHOLMEE	Memorandum in Support of Motion for Summary Judgment
5/23/2013	AMEN	CCHEATJL	Amended Notice Of Intent
5/29/2013	NOTC	CCREIDMA	Notice Of Hearing (07/11/2013 @ 3:30pm)
5/30/2013	ANSW	CCHOLMEE	Answer to Amended Complaint and Demand for Jury Trial (Greener for Goodman Manufacturing)
5/31/2013	NOTS	CCMEYEAR	Notice Of Service
	NOTS	CCKHAMSA	(3) Notice Of Service

Date	Code	User		Judge
6/13/2013	NOTS	MCBIEHKJ	Notice Of Service	Cheri C. Copsey
	AFOS	CCMEYEAR	Affidavit Of Service (06/12/2013)	Cheri C. Copsey
6/14/2013	NOTS	CCHEATJL	Notice Of Service	Cheri C. Copsey
6/17/2013	BREF	CCMARTJD	Brief in Opposition to Motion for Summary Judgment	Cheri C. Copsey
6/27/2013	NOTS	CCMEYEAR	Notice Of Service	Cheri C. Copsey
	REPL	TCLAFFSD	Reply Brief In Support Of Motion To Dismiss	Cheri C. Copsey
7/1/2013	NOTS	CCPINKCN	Notice Of Service	Cheri C. Copsey
7/3/2013	RPLY	CCMARTJD	Reply Brief of Defendant Park Center Plumbing Inc	Cheri C. Copsey
7/11/2013	DCHH	CCMASTLW	Hearing result for Motion to Dismiss scheduled on 07/11/2013 03:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: less than 50	Cheri C. Copsey
7/15/2013	MOTN	CCVIDASL	Plaintiffs Motion for Order Equitably Tolling the Statute of Limitations as it Applies to Defendants Idaho Geothermal LLC PC Plumbing Inc and Sagecrest Development LLC	Cheri C. Copsey
	AFFD	CCVIDASL	Affidavit in Support of Plaintiffs Motion for Order Equitably Tolling the Statute of Limitations as it Applies to Defendants Idaho Geothermal LLC PC Plumbing Inc and Sagecrest Development LLC	Cheri C. Copsey
	MEMO	CCVIDASL	Memorandum in Support of Plaintiffs Motion for Order Equitably Tolling the Statute of Limitations as it Applies to Defendants Idaho Geothermal LLC PC Plumbing Inc and Sagecrest Development LLC	Cheri C. Copsey
	NOTH	CCPINKCN	Notice Of Hearing Re: Plaintiff's Motion for Order Equitably Tolling the Statute of Limitations as it Applies to Defendants Idaho Geothermal LLC, PC Plumbing Inc, and Sagecrest Development LLC (08/01/13 at 3:00 p.m.)	Cheri C. Copsey
	HRSC	CCPINKCN	Hearing Scheduled (Motion 08/01/2013 03:00 PM) Mo/Equitably Toll Statute of Limitations; Mo/Amend Complaint	Cheri C. Copsey
7/17/2013	MOTN	CCREIDMA	Plaintiff's Motion to Amend Complaint	Cheri C. Copsey
	MEMO	CCREIDMA	Memorandum In Support of Plaintiffs' Motion to Amend Complaint	Cheri C. Copsey
	NOTH	CCREIDMA	Notice Of Hearing Re: Plaintiffs' Motion to Amend Complaint	Cheri C. Copsey
7/22/2013	NOTS	CCPINKCN	Notice Of Service	Cheri C. Copsey
	NOTS	CCHEATJL	Notice Of Service	Cheri C. Copsey
7/23/2013	JDMT	CCMASTLW	Judgment (Park Center Plumbing)	Cheri C. Copsey

Date	Code	User	Judge
7/23/2013	JDMT	CCMASTLW	Judgment in Favor of Sagecrest Development LLC
	CDIS	CCMASTLW	Civil Disposition entered for: Park Center Plumbing Inc, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 7/23/2013
	CDIS	CCMASTLW	Civil Disposition entered for: Sagecrest Developement Llc, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 7/23/2013
7/25/2013	AFFD	CCNELSRF	Affidavit of Tracy L Wright
	MEMO	CCNELSRF	Defendant Idaho Geothermal LLC's Memorandum in Opposition to Plf's Motion for Order Equitably Tolling the Statue of Limitations
	BREF	CCMEYEAR	Defendant Park Center Plumbing Inc's Responsive Brief Opposing Plaintiffs' Motion for Order Equitably Tolling theStatute of Limitations
7/26/2013	MEMO	CCMEYEAR	Sagecrest Development LLC's Memorandum in Response to Plainitffs' Motion for Equitably Tolling Order
7/29/2013	NOTS	CCPINKCN	(2) Notice Of Service
7/30/2013	REPL	CCMEYEAR	Plaintiff's Reply Memorandum in Support of Plaintiffs' Motion for Order Equitably Tolling th3e Statute of Limitations as it Applies to Defendants Idaho Geothermal LLC PC Plumbing INc and Sagecrest Development LLC
8/1/2013	DCHH	CCMASTLW	Hearing result for Motion scheduled on 08/01/2013 03:00 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Mo/Equitably Toll Statute of Limitations; Mo/Amend Complaint less than 50
	ORDR	CCMASTLW	Order Granting Motion to Amend Complaint
	AMEN	CCNELSRF	Second Amended Complaint and Demand for Jury Trial
	SMFI	CCNELSRF	Another Summons Filed
8/7/2013	AFOS	CCGDULKA	Affidavit Of Service (8/6/13)
8/8/2013	AFOS	CCHOLMEE	(2) Affidavit Of Service 8.2.13
	AFOS	CCKHAMSA	Affidavit Of Service (08/06/13)
8/9/2013	NOTS	CCSCOTDL	Notice Of Service
8/12/2013	ANSW	CCOSBODK	Answer To Plaintiffs Second Amended Complaint (Greener FOr Goodman Manufacturing Company)
8/15/2013	MISC	CCMASTLW	Stipulated Protocol and Chain of Custody
	ORDR	CCMASTLW	Order Granting Summary Judgment

Date	Code	User	Judge
8/16/2013	JDMT	CCMASTLW	Judgment (in favor of Idaho Geothermal, PC Plumbing, Sagecrest Development)
	CDIS	CCMASTLW	Civil Disposition entered for: Park Center Plumbing Inc, Defendant; Sagecrest Developement Llc, Defendant; Widgeon Mechanical Llc, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 8/16/2013
8/19/2013	NOTS	MCBIEHKJ	Notice Of Service
8/21/2013	AFOS	CCKINGAJ	Affidavit Of Service 08.16.2013
8/22/2013	ANSW	CCMEYEAR	Defendant Anfinson Plumbing's Answer to Second Amended Complaint and Demand for Jury Trial
	NOTS	CCMEYEAR	Notice Of Service
8/26/2013	ANSW	TCHOLLJM	A. O. Smith, Inc's Answer To Second Amended Complaints (James D LaRue for A.O Smith Inc)
8/28/2013	ANSW	CCNELSRF	Defendant First Rate Property Management's and Tony Drost's Answer to Second Amended Complaint and Demand for Jury Trial (Robert Mills)
8/29/2013	MOTN	CCMARTJD	Intermountain Gas Company Motion to Dismiss
	MEMO	CCMARTJD	Memorandum in Support of Motion to Dismiss
9/3/2013	ANSW	CCVIDASL	Defendants Sagecrest Multi Family Property Owners Association Inc Jon Kalsbeek Jay Arla Christopher Schwab and David Meisners Answer to Plaintiffs Second Amended Complaint and Demand for Jury Trial
	NOTS	CCKHAMSA	Notice Of Service
9/6/2013	RQTS	MCBIEHKJ	Request For Trial Setting
	RSPN	CCWEEKKG	Defendant First Rate Property Management's and Tony Drost's Response for Trial Setting
9/9/2013	RSPN	CCHEATJL	Defendaant Switzer's Response To Plaintiffs' Request For Trial Setting
	RESP	CCVIDASL	Defendants Response To Plaintiffs Request for Trial Setting
	REQU	CCHOLMEE	Defendant Intermountain Gas Company's Request for Trial Setting
9/11/2013	NOTD	MCBIEHKJ	Notice Of Taking Deposition to Adra Kipper
	MOTD	MCBIEHKJ	Motion To Dismiss to Breanna Halowell
	RSPN	CCBOYIDR	Defendant Goodman Manufacturing Company, LP's Response to Plaintiffs' Request for Trial Setting
9/12/2013	ORDR	CCMASTLW	Scheduling Order
	HRSC	CCMASTLW	Hearing Scheduled (Motion to Dismiss 11/07/2013 02:30 PM)

Date	Code	User	Judge
9/12/2013	RESP	CCNELSRF	Defendant Anfinson Plumbing Response To Request For Trial Setting
	ANSW	CCVIDASL	Defendant H&H Properties LLCs Answer to Second Amended Complaint and Demand for Jury Trial (Fuhrman for H&H Properties LLC)
9/16/2013	NOTC	CCMASTLW	Notice of Telephonic Status Conference
	HRSC	CCMASTLW	Hearing Scheduled (Status by Phone 11/15/2013 08:30 AM)
9/18/2013	RSPN	CCHEATJL	Defendant A.O. Smith Inc's Response To Plaintiffs' Request For Trial Setting
9/19/2013	MOTN	CCVIDASL	Defendant First Rate Property Managments and Tony Drost's Motion to File Documents Subject to Protective Order Under Seal
	AFFD	CCVIDASL	Affidavit of Robert A Mills in Support of Defendant First Rate Property Managments and Tony Drost's Motion to File Documents Subject to Protective Order Under Seal
	NOHG	CCVIDASL	Notice Of Hearing
	HRSC	CCVIDASL	Hearing Scheduled (Motion 10/10/2013 03:00 PM) Motion to File Documents Subject to Protective Order Under Seal
9/27/2013	STIP	CCSWEECE	Stipulated Notice of Non-Objection to Motion to File Documents Subject to Protective Order Under Seal
9/30/2013	ORDR	CCMASTLW	Order re Motion to File Documents Under Seal
	HRVC	CCMASTLW	Hearing result for Motion scheduled on 10/10/2013 03:00 PM: Hearing Vacated Motion to File Documents Subject to Protective Order Under Seal
10/3/2013	BREF	CCNELSRF	Plf's Brief in Opposition to Defendant Intermountain Gas's Motion to Dismiss
	AFFD	CCNELSRF	Plf's Affidavit in Opposition to Defendant Intermountain Gas's Motion to Dismiss
10/18/2013	RPLY	CCWATSCL	Intermountain Gas Company's Reply in Support of Motion to Dismiss
	OBJT	CCWATSCL	Objection to Affidavit in Opposition to Motion to Dismiss
10/21/2013	ANSW	CCHOLMEE	Answer to Second Amended Complaint (Haman for Matthew E Switzer Trust and Matthew E Switzer as Trustee)
	NOTS	CCKHAMSA	Notice Of Service
10/24/2013	STIP	MCBIEHKJ	Stipulation for Scheduling and Planning
10/25/2013	HRVC	CCMASTLW	Hearing result for Status by Phone scheduled on 11/15/2013 08:30 AM: Hearing Vacated
10/30/2013	NOTC	CCVIDASL	Notice of Continuing Deposition to Breanna Holowell

Date	Code	User		Judge
10/30/2013	NOTC	CCVIDASL	Notice of Deposition to Travis Forbush	Cheri C. Copsey
	NOTC	CCVIDASL	Notice of Deposition to Gretchen Hymas	Cheri C. Copsey
11/1/2013	NOTS	CCOSBODK	Notice Of Service	Cheri C. Copsey
	NOTC	CCOSBODK	Notice Of Deposition Of Mathew E Switzer	Cheri C. Copsey
11/4/2013	NOTS	MCBIEHKJ	Notice Of Service	Cheri C. Copsey
	ORDR	CCMASTLW	Order Governing Proceedings and Setting Trial	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Jury Trial 01/12/2015 09:00 AM) 20d	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Pretrial Conference 01/08/2015 04:30 PM)	Cheri C. Copsey
11/5/2013	RSPN	CCHEATJL	Plaintiffs' Response To Objection To Plaintiff's Affidavit In Opposition To Intermaountain Gas's Motion To Dismiss	Cheri C. Copsey
	OBJT	CCHEATJL	Plaintiffs' Objection To Intermountain Gas Company's Reply In Support Of Motion To Dismiss	Cheri C. Copsey
	NOTS	MCBIEHKJ	Notice Of Service	Cheri C. Copsey
	NOTS	CCOSBODK	Notice Of Service	Cheri C. Copsey
11/7/2013	DCHH	CCMASTLW	Hearing result for Motion to Dismiss scheduled on 11/07/2013 02:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: less than 100	Cheri C. Copsey
11/8/2013	NOTD	MCBIEHKJ	Notice Of Taking Deposition of Robert Peterson	Cheri C. Copsey
	NOTS	MCBIEHKJ	Notice Of Service	Cheri C. Copsey
11/12/2013	NOTS	TCLAFFSD	Notice Of Service Of Plaintiff Travis Forbush's Second Set Of Discovery To Defendants First Rate Property Management And Tony Drost	Cheri C. Copsey
	NOTC	CCHOLMEE	3 Day Notice of Intent to take Default and Seek Default Judgment and Against Defendant Intermountain Gas	Cheri C. Copsey
11/13/2013	NOTS	CCKHAMSA	Notice Of Service	Cheri C. Copsey
11/18/2013	MOED	TCLAFFSD	Plaintiff's Motion For Default Against Defendant Intermountain Gas	Cheri C. Copsey
	ANSW	CCHOLMEE	Answer to Second Amended Complaint and Demand for Jury Trial (Thomas for Intermountain Gas)	Cheri C. Copsey
	NOTC	CCVIDASL	Notice of Deposition of Tara Gaertner	Cheri C. Copsey
11/20/2013	NOTD	CCHEATJL	Corrected Notice Of Taking Deposition Of Robert Peterson	Cheri C. Copsey
	NOTD	CCHEATJL	Amended Notice Of Taking Deposition Of Matthew Switzer	Cheri C. Copsey

Date	Code	User	Judge
11/20/2013	NOTD	CCHEATJL	Amended Notice Of Taking Deposition Of Tara Gaertner
	NOTD	CCNELSRF	Second Amended Notice Of Taking Deposition Of Cheri C. Copsey Matthew Switzer
	NOTD	CCNELSRF	Second Amended Notice Of Taking Deposition Of Cheri C. Copsey Tara Gaertner
	OPPO	CCOSBODK	Intermountain Gas Companys Opposition To Plaintiffs Motion For Default
11/21/2013	ORDR	CCMASTLW	Order Denying Motion for Default
	ORDR	CCMASTLW	Limited Order Staying Previously-Scheduled Salt Lake Expert Inspection of Water Heater
	NOTD	TCRUDZES	Corrected Second Amended Notice Of Taking Deposition Of Tara Gaertner
11/25/2013	NOTS	CCHEATJL	(2) Notice Of Service
11/26/2013	NOTS	CCOSBODK	Notice Of Service
11/29/2013	NOTH	TCLAFFSD	Notice Of Hearing On Defendant Intermountain Gas Company's Motion To Dismiss And/Or Motion for Summary Judgment
	HRSC	TCLAFFSD	Hearing Scheduled (Motion 02/06/2014 03:30 PM) Defendant Intermountain Gas Company's Motion To Dismiss And/Or Motion for Summary Judgment
12/2/2013	MODQ	CCSWEECE	Plaintiffs Motion To Disqualify Judge for Cause
	AFSM	CCSWEECE	Plaintiffs Affidavit In Support Of Motion to Disqualify Judge for Cause
	MEMO	CCSWEECE	Memorandum in Support of Plaintiffs Motion to Disqualify Judge For Cause
	REQU	CCTHIEKJ	Request for Hearing RE: Plaintiffs' Motion to Disqualify Judge for Cause
12/3/2013	NOTC	CCHOLMEE	Notice of Substitution of Counsel for Defendant's Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner (Howell for Elia)
12/6/2013	HRSC	CCHEATJL	Notice Of Hearing Scheduled (Motion 01/09/2014 03:00 PM) Motion To Disqualify Judge
12/9/2013	NOTC	CCHOLMEE	Notice of Second Continuing Deposition to Breanna Halowell
	MOTN	TCLAFFSD	Plaintiffs' Motion To Amend Complaint To Add A Claim For Punitive Damages Against Anfinson Plumbing And H&H Properties
12/10/2013	NOTS	CCMARTJD	Notice Of Service
12/12/2013	NOTD	CCMARTJD	Notice Of Taking Deposition
	NOTD	TCRUDZES	Notice Of Taking Deposition of Tony Drost
	NOTD	CCMARTJD	(2) Notice Of Taking Deposition

Date	Code	User		Judge
12/18/2013	MOTN	CCHOLMEE	Motion to Amend Complaint	Cheri C. Copsey
	MEMO	CCHOLMEE	Memorandum in Support of Motion	Cheri C. Copsey
12/19/2013	AFSM	TCLAFFSD	Affidavit In Support Of Plaintiffs' Motion To Amend Complaint To Include A Claim For Punitive Damages Against Anfinson Plumbing	Cheri C. Copsey
	AFFD	TCLAFFSD	Affidavit Of Ada County Coroner Erwin L Sonnenberg	Cheri C. Copsey
	AFFD	TCLAFFSD	Affidavit Of Jerry Peterson	Cheri C. Copsey
	AFFD	CCKHAMSA	Affidavit Of Kenny Calkins	Cheri C. Copsey
	AFFD	CCKHAMSA	Affidavit Jerry Peterson	Cheri C. Copsey
	NOHG	CCHOLMEE	Notice Of Hearing Re Second Motion to Amend Complaint 1.16.14@330PM	Cheri C. Copsey
	HRSC	CCHOLMEE	Hearing Scheduled (Motion 01/16/2014 03:30 PM) to Amend Complaint	Cheri C. Copsey
12/20/2013	NOSV	CCHOLMEE	Notice Of Service	Cheri C. Copsey
12/23/2013	MEMO	CCMARTJD	Memorandum in Support of Motion to Amend Complaint to Add a Claim for Punitive Damages	Cheri C. Copsey
	NOHG	CCMARTJD	Notice Of Hearing re Motion to Amend Complaint (1.16.14@3:30pm)	Cheri C. Copsey
12/24/2013	OBJC	CCVIDASL	Plaintiffs Objection to and Motion to Strike the Courts Limited Order Staying Previously Scheduled Salt Lake Expert Inspection of Water Heater	Cheri C. Copsey
12/26/2013	AMEN	TCLAFFSD	Amended Notice of Deposition Of Jon Kalsbeek	Cheri C. Copsey
	AMEN	TCLAFFSD	Amended Notice Of Deposition Of Tony Drost	Cheri C. Copsey
12/30/2013	RSPS	CCMARTJD	Response to Plaintiffs Motion to Disqualify Judge	Cheri C. Copsey
	NOTC	TCLAFFSD	Notice Of Joinder In IGC's Response To Plaintiffs' Motion To Disqualify Judge For Cause	Cheri C. Copsey
12/31/2013	NOTC	TCLAFFSD	Notice Of Joinder	Cheri C. Copsey
	NOTC	CCNELSRF	Notice Of Joinder in Response	Cheri C. Copsey
1/2/2014	NOTC	CCKHAMSA	Notice Of Joinder	Cheri C. Copsey
	NOTC	CCMARTJD	Notice of Joinder	Cheri C. Copsey
1/6/2014	MEMO	TCRUDZES	Memorandum in Support of Plaintiffs Motion to Disqualify Judge	Cheri C. Copsey
1/8/2014	AFFD	CCHEATJL	Plaintiffs' Affidavit In Opposition To Intermountain Gas's Motion For Summary Judgment	Cheri C. Copsey
1/9/2014	DCHH	CCMASTLW	Hearing result for Motion scheduled on 01/09/2014 03:00 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Motion To Disqualify Judge less than 50	Cheri C. Copsey
	CONT	CCMASTLW	Continued (Motion 01/30/2014 02:30 PM) to Amend Complaint; Mo/Add Punitive Damages	Cheri C. Copsey

Date	Code	User		Judge
1/9/2014		CCMASTLW	Notice of Hearing (01/30/14 @ 2:30pm)	Cheri C. Copsey
	RSPN	CCSWEECE	Defendant Goodman Manufacturing Company LPs Response to Plaintiffs Second Motion to Amend Complaint and Objection to Certain Provisions of Plaintiffs Proposed Third Amended Complaint	Cheri C. Copsey
	OBJT	CCHEATJL	Objection To Plaintiffs' Motion And Memorandum Regarding Punitive Damages	Cheri C. Copsey
	OBJE	TCRUDZES	Objection to Plaintiffs' Second Motion to Amend Complaint by Intermountain Gas Company	Cheri C. Copsey
	MOTN	TCRUDZES	Motion for Summary Judgment by Intermountain Gas Company	Cheri C. Copsey
	MEMO	TCRUDZES	Memorandum in Support of Motion for Summary Judgment by Intermountain Gas Company	Cheri C. Copsey
	MISC	TCRUDZES	Declaration of Stephen R Thomas in Support of Motion for Summary Judgment by Intermountain Gas Company	Cheri C. Copsey
	MISC	TCRUDZES	Declaration of Jim Stattner	Cheri C. Copsey
	MISC	TCRUDZES	Declaration of Robert Peterson	Cheri C. Copsey
	NOHG	TCRUDZES	Notice Of Hearing re: Motion for Summary Judgment 02/06/14 3:30PM	Cheri C. Copsey
	HRSC	TCRUDZES	Hearing Scheduled (Motion for Summary Judgment 02/06/2014 03:30 PM)	Cheri C. Copsey
	MOTN	CCVIDASL	Defendant H & H Properties LLCs Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCVIDASL	Affidavit of Craig Hamilton	Cheri C. Copsey
	AFFD	CCVIDASL	Affidavit of Peter Anfinson	Cheri C. Copsey
	MEMO	CCVIDASL	Memorandum in Support of Defendant H & H Properties LLCs Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCVIDASL	Affidavit of Christopher P Graham in Opposition to Plaintiffs Motion to Amend Complaint to Add A Claim for Punitive Damages	Cheri C. Copsey
	MEMO	CCVIDASL	Defendants Anifinson Plumbing and H & H Properties LLCs Memorandum in Opposition to Plaintiffs Motion to Amend Complaint to Add a Claim for Punitive Damages	Cheri C. Copsey
1/10/2014	NOTS	CCHEATJL	Notice Of Service	Cheri C. Copsey
	ORDR	CCMASTLW	Scheduling Order	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 02/20/2014 02:30 PM) H & H Properties	Cheri C. Copsey
	ORDR	DCDANSEL	Order Denying Motion to Disqualify for Cause	Cheri C. Copsey
	NOTC	DCDANSEL	Notice of Intent to Rule Without Hearing	Cheri C. Copsey

Date	Code	User		Judge
1/10/2014	NOTS	CCSWEECE	Notice Of Service Of Defendant Intermountain Gas Companys First Supplemental Answers and Responses to Plaintiff Travis Forbushs First Set Of Discovery	Cheri C. Copsey
1/14/2014	ORDR	DCDANSEL	Order Denying Motion for Reconsideration	Cheri C. Copsey
	AMEN	CCSWEECE	Amended Notice of Hearing RE: Plaintiffs Motion to Amend Complaint to Add A Claim for Punitive Damages Against Anfinson Plumbing and H&H Properties (January 30, 2014 @ 2:30 PM)	Cheri C. Copsey
	NOTS	TCLAFFSD	Notice Of Service Of Plaintiffs' Second Set Of Discovery To Defendant H&H Properties	Cheri C. Copsey
1/15/2014	NOTS	CCNELSRF	Notice Of Service	Cheri C. Copsey
1/16/2014	MISC	CCOSBODK	Defendant Switzers Joinder In Defendant First Rates Objection To Plaintiffs Motion To Amend Re Punitive Damages	Cheri C. Copsey
	MOTN	CCHOLMEE	Plaintiff's Amended Second Motion to Amend Complaint	Cheri C. Copsey
	AFSM	CCHOLMEE	Affidavit In Support Of Motion	Cheri C. Copsey
	NOHG	CCMARTJD	Notice Of Hearing re Plaintiffs Amended Second Motion to Amend Complaint (1.30.14@2:30pm)	Cheri C. Copsey
	AMEN	CCMARTJD	Amended Memorandum in Support of Motion to Amend Complaint	Cheri C. Copsey
1/21/2014	ORDR	CCMASTLW	Scheduling Order	Cheri C. Copsey
	ORDR	CCMASTLW	Order Vacating January 30, 2014 Hearing and Setting New Hearing	Cheri C. Copsey
	CONT	CCMASTLW	Continued (Motion 02/27/2014 03:00 PM) to Amend Complaint	Cheri C. Copsey
1/22/2014	AFFD	CCVIDASL	Affidavit of Kenny Calkins	Cheri C. Copsey
	AFFD	CCBARRSA	Affidavit of Arthur J Ramirez II	Cheri C. Copsey
	AFFD	CCHEATJL	Affidavit Of Captain Timothy Kelley Meridian Fire Department	Cheri C. Copsey
	AFFD	CCHOLMEE	Affidavit of Kenny Calkins Filed in Response to H&H Properties' Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCHOLMEE	Affidavit of Captain Timothy Kelley Meridian Fire Department	Cheri C. Copsey
1/23/2014	OBJE	TCRUDZES	Defendant Switzers' Joinder in Defendant First Rate's Objection to Plaintiffs' Motion to Amend Re Punitive Damages and Objection to Plaintiffs' Amended Second Motion to Amend Complaint	Cheri C. Copsey
	AFFD	CCSWEECE	Plaintiffs Second Affidavit in Opposition to Intermountain Gas's Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCSWEECE	Affidavit of Daniel Munoz	Cheri C. Copsey
	AFFD	CCSWEECE	Affidavit of Ben Davis	Cheri C. Copsey
	AFFD	CCSWEECE	Affidavit of David Heldenbrand	Cheri C. Copsey

Date	Code	User	Judge
1/23/2014	OBJT	CCSWEECE	Plaintiffs Objections to the Declarations of Robert Peterson and Jim Stattner
	AFFD	CCSWEECE	Affidavit of Deputy Chief Perry Palmer Meridian Fire Department
	BREF	CCSWEECE	Plaintiffs Brief in Opposition to Defendant Intermountain Gas's Motion for Summary Judgment
	AFFD	CCSWEECE	Affidavit of Captain Timothy Kelley Meridian Fire Department
	OBJE	TCRUDZES	Plaintiffs' Objection to the Court's Order Vacating January 30, 2014 Hearing and Setting New Hearing
	OBJE	CCWEEKKG	Objection to Plaintiffs' Amended Second Motion to Amend Complaint
1/24/2014	MOTN	CCOSBODK	Motion To Amend Complaint
	MISC	CCOSBODK	Plaintiffs Brief In Opposition To Motion For Summary Judgment
	AFFD	CCOSBODK	Affidavit In Opposition To Motion For Summary Judgment
	BREF	CCSCOTDL	Plaintiffs Brief in Opposition to Defendant H&H Properties Motion for Summary Judgment
	OBJE	CCSCOTDL	Defendant Sagecrest Multi Family Property Owners Association Incs Objection to Plaintiffs Second Motion to Amend Complaint
1/28/2014	NOTS	CCMARTJD	Notice Of Service
	NOTS	TCLAFFSD	Notice Of Service
1/30/2014	REPL	TCLAFFSD	Plaintiffs' Reply Memorandum Filed In Support Of Motion To Amend Complaint To Add A Claim For Punitive Damages Against Anfinson Plumbing And H&H Properties
	MISC	CCNELSRF	Second Declaration of Robert Peterson
	REPL	CCNELSRF	Reply Memorandum in Support of Motion for Summary Judgment by Intermountain Gas Company
	RESP	CCVIDASL	Response of Intermountain Gas Company to Plaintiffs Objections to the Declarations of Robert Peterson and Jim Stattner
2/3/2014	REPL	CCSWEECE	Reply Memorandum in Support of Defendant H & H Propertie4s LLCs Motion for Summary Judgment
2/5/2014	OPPO	TCLAFFSD	Defendant A.O. Smith, Inc.'s Opposition To Plaintiffs' Amended Second Motion To Amend Complaint

Date	Code	User		Judge
2/5/2014	AFFD	TCLAFFSD	Affidavit Of Matthew L. Walters In Support Of Defendant A.O. Smith, Inc.'s Opposition To Plaintiffs' Amended Second Motion To Amend Complaint	Cheri C. Copsey
	OBJE	CCNELSRF	Defendant Goodman Manufacturing Company Renewal of Response and Objection to Plf's Amended Second Motion to Amended Complaint	Cheri C. Copsey
2/6/2014	DCHH	CCMASTLW	Hearing result for Motion scheduled on 02/06/2014 03:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Defendant Intermountain Gas Company's Motion To Dismiss And/Or Motion for Summary Judgment Less than 50	Cheri C. Copsey
	OPPO	CCSWEECE	Defendants Kalsbeek, Arla, Schwab and Meisners Opposition to Plaintiffs Amended Second Motion to Amend Complaint and Notice of Joinder	Cheri C. Copsey
2/7/2014	OBJE	TCRUDZES	Defendant Intermountain Gas Company's Objection to Plaintiffs' Amended Second Motion to Amend Complaint	Cheri C. Copsey
	DECL	CCSWEECE	Declaration of Plaintiffs Counssel Filed In Support of Plaintiffs Motion to Amend to Include a Claim for Punitive Damages Against Defendants First Rate, Drost, Sagecrest POA and Kalsbeek	Cheri C. Copsey
	MEMO	CCSWEECE	Plaintiffs Memorandum Filed in Support of Plaintiffs Motion to Amend to Include a Claim for Punitive Damages Against Defendants First Rate, Drost, Sagecrest POA and Kalsbeek	Cheri C. Copsey
	AFFD	CCHEATJL	Affidavit Of David Heldenbrand Filed In Support Of Plaintiffs' Motion to Amend To Include A Claim For Punitive Damages Against Defendants First Rate, Drost, Sagecrest POS And Kalsbeek	Cheri C. Copsey
	DECL	CCHEATJL	Declaration Of Rick Everton P.E.	Cheri C. Copsey
2/10/2014	NOTS	CCHEATJL	Notice Of Service	Cheri C. Copsey
2/11/2014	NOTS	CCHEATJL	Notice Of Service	Cheri C. Copsey
2/12/2014	DECL	CCVIDASL	Declaration of David Heldenbrand PE Filed in Support of Plaintiffs Motion to Reconsider	Cheri C. Copsey
	MISC	CCREIDMA	Plaintiff's Reply to Various Objections to Their Amended Motion to Amend Complaint	Cheri C. Copsey
	MOTN	CCBARRSA	Motion for Reconsideration Re: Defendant Intermountain Gas's Motion for Summary Judgment	Cheri C. Copsey
2/13/2014	ORDR	CCMASTLW	Scheduling Order	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Hearing Scheduled 03/13/2014 03:30 PM) Mo/Reconsider	Cheri C. Copsey
2/19/2014	NOTS	CCMARTJD	Notice Of Service	Cheri C. Copsey

Date	Code	User		Judge
2/20/2014	NOTS	CCVIDASL	Notice Of Service of Plaintiffs Responses to Defendants Jon Kalsbeek Jay Arla Christopher Schwab and David Misners First Set of Interrogatories and Requests for Production of Documents to Plaintiff	Cheri C. Copsey
	DCHH	CCMASTLW	Hearing result for Motion for Summary Judgment scheduled on 02/20/2014 02:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: H & H Properties less than 50	Cheri C. Copsey
	MISC	CCWEEKKG	Declaration of Eric Clark Filed in Support of Plaintiff's Motion to Reconsider	Cheri C. Copsey
	BREF	CCWEEKKG	Plaintiff's Brief in Support of Motion for Reconsideration	Cheri C. Copsey
2/21/2014	ORDR	CCMASTLW	Order for Additional Briefing	Cheri C. Copsey
	ORDR	CCMASTLW	Order Granting Summary Judgment to Defendant Intermountain Gas Company	Cheri C. Copsey
	CDIS	CCMASTLW	Civil Disposition entered for: Intermountain Gas Company, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 2/21/2014	Cheri C. Copsey
2/27/2014	STIP	CCVIDASL	Stipulation to Change Expert Witness Disclosure Deadlines	Cheri C. Copsey
	MOTN	CCVIDASL	Plaintiffs Motion for Certificate of Final Judgment	Cheri C. Copsey
	DCHH	CCMASTLW	Hearing result for Motion scheduled on 02/27/2014 03:00 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: 2nd Mo/Amend Complaint; Amended 2nd Mo/Amend Complaint less than 100	Cheri C. Copsey
	NOSV	CCBOYIDR	Notice Of Service-Goodman Manuufacturing, LP's Answers and Responses to Plaintiff's Second Set of Discovery	Cheri C. Copsey
	OBJC	CCVIDASL	Intermountain Gas Companys Objection to Second Heldenbrand Declaration	Cheri C. Copsey
	DECL	CCVIDASL	Seconcd Declaration of Stephen R Thomas	Cheri C. Copsey
	DECL	CCVIDASL	Second Declaration of Jim Stattner	Cheri C. Copsey
	OPPO	CCVIDASL	Intermountain Gas Companys Opposition to Plaintiffs Motion for Reconsideration	Cheri C. Copsey
	MISC	CCMARTJD	Plaintiffs Declaration of Emilee Wallace Filed in Opposition to H&H Properties Motion for Summary Judgment	Cheri C. Copsey
2/28/2014	MISC	CCMARTJD	Plaintiffs Declaration of Counsel Filed in Opposition to H&H Properties Motion for Summary Judgment	Cheri C. Copsey

Date	Code	User		Judge
2/28/2014	BREF	CCMARTJD	Plaintiffs Brief in Opposition to Defendant H&H Properties Motion for Summary Judgment	Cheri C. Copsey
3/3/2014	MOTN	CCHOLMEE	Motion for Reconsideration of the Denial of Motion to Amend Complaint and Punitive Damages Against Anfinson Plumbing	Cheri C. Copsey
	NOTC	CCMASTLW	Notice of Intent to Rule Without Hearing	Cheri C. Copsey
	NOTD	CCSWEECE	Notice Of Taking Deposition of Sheila Thomason	Cheri C. Copsey
	NOTD	CCSWEECE	Notice Of Taking Deposition of Missy Rushing	Cheri C. Copsey
	NOTD	CCSWEECE	Notice Of Taking Deposition of Jim Stattner	Cheri C. Copsey
	NOTD	CCSWEECE	Notice Of Taking Deposition of Christopher Coe	Cheri C. Copsey
	MEMO	CCREIDMA	Supplemental Memorandum in Support of Defendant H&H Properties, LLC's Motion for Summary Judgment	Cheri C. Copsey
	RSPN	CCKINGAJ	Defendant Sagrecrest Multi-Family Property Owners' Association, Inc Response to Court's Order for Additional Briefing Dated February 20, 2014	Cheri C. Copsey
	AFFD	CCKINGAJ	Affidavit of Counsel Submitted in Support of Defendant Sagrecrest Multi-Family Property Owners' Association, Inc Response to Court's Order for Additional Briefing Dated February 20, 2014	Cheri C. Copsey
3/4/2014	DECL	CCHOLMEE	Declaration of Plaintiff's Counsel Filed in Support of Motion for Reconsideration of the Denial of Plaintiff's Motion to Amend Complaint for Punitive Damages Against Anfinson Plumbing Filed	Cheri C. Copsey
3/5/2014	AMEN	CCVIDASL	Amended Notice of Deposition of Daniel Bakken	Cheri C. Copsey
	AMEN	CCVIDASL	Amended Notice of Deposition of Missy Rushing	Cheri C. Copsey
	AMEN	CCVIDASL	Amended Notice of Deposition Sheila Thomason	Cheri C. Copsey
	AMEN	CCMARTJD	Amended Notice of Deposition of Daniel Bakken	Cheri C. Copsey
	AMEN	CCMARTJD	Second Amended Notice of Deposition	Cheri C. Copsey
3/6/2014	REPL	TCLAFFSD	Plaintiffs' Reply Brief In Support of Motion for Reconsideration Of The Order Granting Summary Judgment to IGC	Cheri C. Copsey
	MISC	TCLAFFSD	Plaintiffs' Response to IGC's Objection To The Second Heldenbrand Declaration	Cheri C. Copsey
3/13/2014	DCHH	TCEDWAAM	Hearing result for Hearing Scheduled scheduled on 03/13/2014 03:30 PM: District Court Hearing Held Court Reporter: Madsen Number of Transcript Pages for this hearing estimated: Less than 200	Cheri C. Copsey
	MOTN	CCSWEECE	Motion for Pro Hac Vice Admission	Cheri C. Copsey
3/17/2014	ORDR	CCMASTLW	Order Granting Motion for Pro Hac Vice Admission	Cheri C. Copsey

Date	Code	User		Judge
3/17/2014	ORDR	CCMASTLW	Order Denying Motion to Amend Complaint to Add Claim for Punitive Damages Against Anfinson Plumbing and H&H Properties	Cheri C. Copsey
	ORDR	CCMASTLW	Order Denying motion for Reconsideration and Dismissing Intermountain Gas Co. With Prejudice	Cheri C. Copsey
	CDIS	CCMASTLW	Civil Disposition entered for: Intermountain Gas Company, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 3/17/2014	Cheri C. Copsey
	NOTC	CCREIDMA	Notice of Withdrawal of Plaintiffs' Motion for Certificate of Final Judgment	Cheri C. Copsey
	NOTC	CCJACKKS	Notice of Withdrawal of Plaintiff's Motion for Reconsideration of the Denial of Plaintiffs' Motion to Amend Complaint for Punative Damages Against Anfinson Plumbing	Cheri C. Copsey
3/20/2014	DECL	CCTHIEKJ	Declaration of Eric Clark Re: Plaintiffs' Third Amended Complaint	Cheri C. Copsey
3/24/2014	ORDR	CCMASTLW	Order Granting Summary Judgment to Defendant H&H Properties LLC	Cheri C. Copsey
	CDIS	CCMASTLW	Civil Disposition entered for: H&H Properties LLC, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 3/24/2014	Cheri C. Copsey
3/31/2014	NOTS	CCTHIEKJ	Notice Of Service	Cheri C. Copsey
	AFFD	CCSWEECE	Affidavit of Counsel in Support of Goodman Manufacturing Company LP's Motion for Summary Judgment	Cheri C. Copsey
	MOTN	CCSWEECE	Goodman Manufacturing Company LP's Motion for Summry Judgment	Cheri C. Copsey
	MEMO	CCSWEECE	Memorandum In Support of Goodman Manufacturing Company LPs Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCSWEECE	Affidavit of Malcolm Southern in Support of Goodman Manufacturing Company LP's Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCSWEECE	Affidavit of Fred B Semke PE in Support of Goodman Manufacturing Company LP's Motion for Summary Judgment	Cheri C. Copsey
4/3/2014	ORDR	CCMASTLW	Scheduling Order - Goodman's Summary Judgment	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 05/22/2014 02:30 PM) Goodman Mfg	Cheri C. Copsey
	NOTS	CCHEATJL	Notice Of Service	Cheri C. Copsey
4/7/2014	STIP	CCSWEECE	Stipulation Regarding Plaintiffs Third Amended Complaint	Cheri C. Copsey
4/10/2014	ORDR	CCMASTLW	Order Amending Order Governing Proceedings	Cheri C. Copsey

Date	Code	User		Judge
4/10/2014	ORDR	CCMASTLW	Order Granting Motion to File 3rd Amended Complaint	Cheri C. Copsey
4/11/2014	COMP	CCSCOTDL	Third Amended Complaint and Demand for Jury Trial	Cheri C. Copsey
	SMFI	CCSCOTDL	Another Summons Filed	Cheri C. Copsey
4/14/2014	NOTS	CCMCLAPM	Notice Of Service	Cheri C. Copsey
4/15/2014	NOTS	CCTHIEKJ	Notice Of Service	Cheri C. Copsey
4/16/2014	NOTC	CCTHIEKJ	Notice of Withdrawal of Motion to Amend to Include a Claim for Punitive Damages Against Defendants First Rate, Drost, Sagecrest POA and Kalsbeek	Cheri C. Copsey
4/17/2014	AMEN	CCREIDMA	Plaintiffs' Third Motion to Amend Complaint	Cheri C. Copsey
	MEMO	CCREIDMA	Memorandum In Suport of Plaintiffs' Third Motion to Amend Complaint	Cheri C. Copsey
4/21/2014	RSPN	CCMCLAPM	Plaintiff's Response in Opposition to Goodman's Motion for Summary Judgment	Cheri C. Copsey
	MOTN	CCMCLAPM	Plaintiff's Rule 56(f) Motion for Continuance	Cheri C. Copsey
	NOTC	CCMCLAPM	Notice of Deposition of Jerry Peterson	Cheri C. Copsey
	ANSW	CCVIDASL	Goodman Manufacturing Company LPs Answer to Plaintiffs Third Amended Complaint	Cheri C. Copsey
4/25/2014	NOTS	TCLAFFSD	Notice Of Service	Cheri C. Copsey
5/1/2014	NOTS	TCLAFFSD	Notice Of Service	Cheri C. Copsey
	MOTN	CCMCLAPM	Motion for Pro Hac Vice Admission	Cheri C. Copsey
5/5/2014	MOTN	CCKINGAJ	Goodman Manufacturing Company LP's Motion to Strike	Cheri C. Copsey
	AFFD	CCKINGAJ	Affidavit of Thomas J. Lloyd III in Support of Goodman Manufacturing Company LP's Motion to Strike	Cheri C. Copsey
	MEMO	CCKINGAJ	Memorandum in Support of Goodman Manufacturing Company LP's Motion to Strike	Cheri C. Copsey
	AFFD	CCKINGAJ	Affidavit of Counsel in Opposition to Plaintiffs' Rule 56(f) Motion for Continuance	Cheri C. Copsey
	MEMO	CCKINGAJ	Goodman Manufacturing Company LP's Memorandum in Opposition to Plaintiffs' Rule 56(f) Motion for Continuance	Cheri C. Copsey
	RPLY	CCKINGAJ	Reply Memorandum in Support of Goodman Manufacturing Company LP's Motion for Summary Judgment	Cheri C. Copsey
5/6/2014	ORDR	CCMASTLW	Order Granting Motion for Pro Hac Vice Admission (Byran Ulmer)	Cheri C. Copsey
	NOHG	CCMARTJD	Notice Of Hearing on Goodman Manufacturing Company LP's Motion to Strike (5.22.14@2:30pm)	Cheri C. Copsey

Date	Code	User		Judge
5/8/2014	NOTD	CCHOLMEE	Notice Of Taking Deposition of Daniel Bakken, and Lizz Loop	Cheri C. Copsey
5/9/2014	NOTC	CCSCOTDL	Amended Notice of Deposition of Daniel Bakken and Lizz Loop	Cheri C. Copsey
5/12/2014	NOTS	TCLAFFSD	Notice Of Service	Cheri C. Copsey
5/15/2014	DECL	TCLAFFSD	May 15, 2014 Declaration Of Eric R. Clark Filed	Cheri C. Copsey
	RSPN	CCTHIEKJ	Plaintiffs' Response in Opposition to Goodman's Motion to Strike	Cheri C. Copsey
5/16/2014	NOTC	CCRADTER	Continued Notice of Deposition of Jon Kalsbeek	Cheri C. Copsey
5/20/2014	MEMO	CCMURPST	reply Memorandum in Support of Goodman Manufacturin Company, LP's Motion to Strike	Cheri C. Copsey
5/21/2014	AMEN	CCHEATJL	Amended Continued Notice Of Deposition Of Jon Kalsbeek	Cheri C. Copsey
5/22/2014	HRVC	CCMASTLW	Hearing result for Motion for Summary Judgment scheduled on 05/22/2014 02:30 PM: Hearing Vacated Goodman Mfg Motion to Strike	Cheri C. Copsey
5/27/2014	NOTS	TCHOLLJM	Notice Of Service Of Defendant Anfinson Plumbing, LLP Answers and Reponses To Plaintiff's Second Set Of Discovery	Cheri C. Copsey
6/2/2014	NOTC	CCHOLMEE	Notice of Change of Address	Cheri C. Copsey
6/9/2014	NOTS	CCTHIEKJ	Notice Of Service	Cheri C. Copsey
6/10/2014	NOHG	CCHOLMEE	Notice Of Hearing 7.3.14@200PM	Cheri C. Copsey
	HRSC	CCHOLMEE	Hearing Scheduled (Motion 07/03/2014 02:00 PM) to Amend Complaint (3rd)	Cheri C. Copsey
6/12/2014	MOTN	CCMCLAPM	Defendants Kalsbeek, Arla, Schwab and Meisners Motion to Dismiss Negligence Claim	Cheri C. Copsey
	MEMO	CCMCLAPM	Memorandum in Support of Defendants Kalsbeek, Arla, Schwab and Meisners Motion to Dismiss Negligence Claim	Cheri C. Copsey
6/13/2014	ORDR	CCMASTLW	Scheduling Order: Rule 12(b)(6) Motion to Dismiss	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Motion to Dismiss 08/14/2014 02:30 PM)	Cheri C. Copsey
	NOTS	TCLAFFSD	Notice Of Service	Cheri C. Copsey
6/16/2014	PLAE	CCBARRSA	Plaintiff's Disclosure of Expert Witnesses	Cheri C. Copsey
6/25/2014	OBJT	TCLAFFSD	Defendant Switzers Objection To Plaintiffs Third Motion To Amend To File Fourth Amended Complaint	Cheri C. Copsey
	OPPO	CCRADTER	Defendants Kelsbeek, Arla, Schwab and Meisner's Opposition to Plaintiffs' Third Motion to Amend Complaint	Cheri C. Copsey

Date	Code	User	Judge
6/26/2014	NOTC	CCMURPST	Defendant Sagecrest Multi-favily Property Owners' Association, INC.'s Notice of Joinder in Defendants Kalsbeek, Arla, Schwab and Meisner's Opposition to Plaintiffs' Third Motion to Amend Complaint
	MISC	CCSCOTDL	Defendants First Rates and Drost's Opposition to Plaintiffs Third Motion to Amend Complaint
	MOTN	CCSCOTDL	Defendant AO Smith Incs Opposition to Plaintiffs Third Motion to Amend Complaint
6/27/2014	NOTD	CCTHIEKJ	Continued Notice Of Deposition of Lizz Loop
6/30/2014	NOTD	CCTHIEKJ	Notice Of 30(b)(6) Deposition of First Rate Property Management
7/1/2014	REPL	CCRADTER	Plaintiff's Reply to Defendants First Rate & Drost's Opposition to Plaintiffs' Third Motion to Amend Complaint
	REPL	CCRADTER	Plaintiff's Reply to Defendants Kalsbeek, Arla, Schwab, and Meisner's Opposition to Plaintiffs' Third Motion to Amend Complaint
	NOTC	CCSCOTDL	Notice of Taking Deposition Duces Tecum of Bernard R Cuzzillo PHD PE
	NOTC	CCSCOTDL	Notice of Taking Deposition Duces Tecum of Glen Stevick PHD PE
	REPL	CCHOLMEE	Reply to Objection
7/3/2014	DCHH	CCMASTLW	Hearing result for Motion scheduled on 07/03/2014 02:00 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: to Amend Complaint (3rd) less than 100
	RSPS	TCLAFFSD	Plaintiffs Response In Opposition To Defendants Kalsbeek, Arla, Schwab, And Meisners Motion To Dismiss Negligence Claim
7/9/2014	MOTN	TCMEREKV	Motion For Permission To File Defendant A.O. Smith's Memorandum In Support Of Motion For Summary Judgment In Excess Of Page Limit
	MISC	TCMEREKV	Defendant A.O. Smith, Inc's Motion For Summary Judgment (Oral Argument Requested)
	MEMO	TCMEREKV	Memorandum In Support Of A.O. Smith, Inc.'s Motion For Summary Judgment
	AFFD	TCMEREKV	Affidavit Of Matthew L Walters In Support Of Defendant A.O. Smith, Inc.'s Motion For Summary Judgment
	AFFD	TCMEREKV	Affidavit Of Derek T Nolen In Support Of A.O. Smith, Inc.'s Motion For Summary Judgment
	AFFD	TCMEREKV	Affidavit Of Charles W Adams In Support Of A.O. Smith, Inc.'s Motion For Summary Judgment
7/10/2014	ORDR	CCMASTLW	Order Granting Motion for Permission

Date	Code	User		Judge
7/10/2014	ORDR	CCMASTLW	Scheduling Order	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 09/11/2014 02:30 PM) A O Smith; Switzer	Cheri C. Copsey
	STIP	TCMEREKV	Stipulation For Dismissal With Prejudice Of Plaintiffs' Claims Against Defendant Goodman Manufacturing Company L.P.	Cheri C. Copsey
7/11/2014	NOTC	TCLAFFSD	Notice Duces Tecum Of Taking The Deposition Upon Oral Examination Of Steve Fender	Cheri C. Copsey
	NOTC	CCVIDASL	Notice of Deposition of Charlie Adams	Cheri C. Copsey
7/14/2014	AMEN	CCVIDASL	Amended Notice of Deposition of First Rate Property Management	Cheri C. Copsey
7/15/2014	ORDR	CCMASTLW	Scheduling Order - Summary Judgment (9/11/14 @ 2:30pm)	Cheri C. Copsey
	ACCP	TCMEREKV	Acceptance Of Service Of Subpoena To Chris Clark 7.11.14	Cheri C. Copsey
7/16/2014	MOTN	CCMARTJD	Motion for Summary Judgment	Cheri C. Copsey
	MEMO	CCMARTJD	Memorandum in Support of Motion	Cheri C. Copsey
	AFSM	CCMARTJD	Affidavit of Michael Haman	Cheri C. Copsey
	MOTN	TCMEREKV	Plaintiffs' Motion To Add A Claim For Punitive Damages Against Defendant Sagecrest Multi Family Property Owners' Association	Cheri C. Copsey
	AFFD	TCMEREKV	Affidavit Of David Saldivar	Cheri C. Copsey
	AFFD	TCMEREKV	Affidavit Of Tyson E. Logan	Cheri C. Copsey
	MOTN	TCMEREKV	Plaintiffs' Motion To Add A Claim For Punitive Damages Against Defendant First Rate Property Management	Cheri C. Copsey
	AFFD	TCMEREKV	Affidavit Of David Saldivar	Cheri C. Copsey
	AFFD	TCMEREKV	Affidavit Of Tyson E. Logan	Cheri C. Copsey
	MOTN	TCMEREKV	Plaintiffs' Motion To Add A Claim For Punitive Damages Against Defendant Jon Kalsbeek	Cheri C. Copsey
	AFFD	TCMEREKV	Affidavit Of David Saldivar	Cheri C. Copsey
	AFFD	TCMEREKV	Affidavit Of Tyson E. Logan	Cheri C. Copsey
	MOTN	TCMEREKV	Plaintiffs' Motion To Add A Claim For Punitive Damages Against Defendant Tony Drost	Cheri C. Copsey
	AFFD	TCMEREKV	Affidavit Of David Saldivar	Cheri C. Copsey
	AFFD	TCMEREKV	Affidavit Of Tyson E. Logan	Cheri C. Copsey
	STIP	CCMCLAPM	Stipulation to Change Deadlines for Motions to Amend to Add Punitive Damages Against Defendant AO Smith	Cheri C. Copsey
7/17/2014	ORDR	CCMASTLW	Order of Dismissal With Prejudice of Plaintiffs' Claims Against Defendant Goodman Mfg Co LP	Cheri C. Copsey

Date	Code	User	Judge
7/17/2014	CDIS	CCMASTLW	Civil Disposition entered for: Goodman Manufacturing Co., Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 7/17/2014
	ORDR	CCMASTLW	Second Order Amending Order Governing Proceedings and Setting Trial
	NOTC	CCMURPST	Notice of Taking Deposition Duces Tecum of Ben Davis
7/23/2014	NOTC	CCRADTER	Notice of Taking Deposition Duces Tecum of Kenny Calkins
7/24/2014	MOTN	CCHEATJL	Defendant Sagecrest Multi Family Property Owners' Association Inc's Motion For Summary Judgment
	AFCO	CCHEATJL	Affidavit Of Counsel Craig D Stacey In Support Of Defendant Sagecrest Multi Family Property Owners' Association Inc's Motion For Summary Judgment
	MEMO	CCHEATJL	Defendant Sagecrest Multi Family Property Owners' Association Inc's Memorandum In Support Of Motion For Summary Judgment
	RPLY	CCHEATJL	Reply Memorandum In Support Of Defendants Kalsbeek, Arla, Schwab And Meisner's Motion To Dismiss Negligence Claim
7/25/2014	MOSJ	TCLAFFSD	Motion For Summary Judgment Re: Claims Against Tony Drost
	AFSM	TCLAFFSD	Affidavit Of Robert A Mills In Support Of Tony Drost's Motion For Summary Judgment
	AFSM	TCLAFFSD	Affidavit Of FRPM President Tony Drost In Support Of Tony Drost's Motion For Summary Judgment
	AFFD	TCLAFFSD	Affidavit Of Lizz Loop
	MEMO	TCLAFFSD	Memorandum In Support of Defendant Tony Drost's Motion For Summary Judgment Re: Claims Against Tony Drost
7/28/2014	ORDR	CCMASTLW	Scheduling Order - Sagecrest's and Drost's Summary Judgment
	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 09/25/2014 02:30 PM) Sagecrest, Drost, Afinson
	MOTN	CCHEATJL	Defendants Anfinson Plumbing LLP And Daniel Bakken's Motion For Summary Judgment
	AFFD	CCHEATJL	Affidavit Of Christopher P. Graham In Support Of Defendants Anfinson Plumbing LLP And Daniel Bakken's Motion For Summary Judgment
	MEMO	CCHEATJL	Memorandum In Support Of Defendants Anfinson Plumbing LLP And Daniel Bakken's Motion For Summary Judgment

Date	Code	User	Judge
7/28/2014	MOTN	CCREIDMA	Motion for Summary Judgment Re: Claims Against Firs Rate Property Management Inc and Tony Drost
	MEMO	CCREIDMA	Memorandum In Support of First Rate Property Management Inc's and Tony Drost's Motion for Summary Judgment Re: Claims Against FRPM and Drost
7/29/2014	ORDR	CCMASTLW	Scheduling Order - Afinson Plumbing's Motion for Summary Judgment
	NOTC	CCMASTLW	Notice of Status Conference (07/31/14 @ 4pm)
	HRSC	CCMASTLW	Hearing Scheduled (Status Conference 07/31/2014 04:00 PM)
	MOTN	CCREIDMA	Defendants Kalsbeek, Arla, Schwab and Meisner's Motion to Dismiss Intentional Infliction of Emotional Harm Claim
	MEMO	CCREIDMA	Memorandum in Support of Defnedants Kalsbeek, Arla, Schwab and Meisner's Motion to Dismiss Intentional Infliction of Emotional Harm Claim
7/30/2014	DECL	CCMARTJD	July 30, 2014 Declaration Of Eric R. Clark In Support Of Plaintiffs' Motions And Memoranda To Amend For Punisitive Damages Against FRPM, Drost, SPOA, & Kalsbeek
	MEMO	CCMARTJD	Memorandum In Support Of Plaintiffs' Motion To Add A Claim For Punitive Damages Against Defendants Tony Drost And First Rate Property Management
	MEMO	CCMARTJD	Memorandum In Support Of Plaintiffs' Motion To Add A Claim For Punitive Damages Against Defendants Jon Kalsbeek And First Rate Property Managment
7/31/2014	DCHH	CCMASTLW	Hearing result for Status Conference scheduled on 07/31/2014 04:00 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: less than 50
	HRVC	CCMASTLW	Hearing result for Jury Trial scheduled on 01/12/2015 09:00 AM: Hearing Vacated 20d
	HRVC	CCMASTLW	Hearing result for Pretrial Conference scheduled on 01/08/2015 04:30 PM: Hearing Vacated
	HRVC	CCMASTLW	Hearing result for Motion for Summary Judgment scheduled on 09/25/2014 02:30 PM: Hearing Vacated Sagecrest; Drost; Afinson
8/1/2014	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 10/30/2014 02:30 PM) Sagecrest POA

Date	Code	User		Judge
8/1/2014	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 11/06/2014 02:30 PM) Drost	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 11/13/2014 02:30 PM) Anfinson Plumbing; Bakken	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 12/04/2014 02:30 PM) First Rate and Drost	Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Motion to Dismiss 12/11/2014 02:30 PM) Kalsbeek, Arla, Schwab, Meisner	Cheri C. Copsey
	ORDR	CCMASTLW	Scheduling Order	Cheri C. Copsey
8/4/2014	NOAP	TCMEREKV	Notice Of Appearance (Lutz for Forbush, Hymas and Halowell)	Cheri C. Copsey
8/7/2014	NOTS	CCTHIEKJ	Notice Of Service	Cheri C. Copsey
	AFFD	CCVIDASL	Supplemental of Affidavit of Glen Stevick	Cheri C. Copsey
	MISC	TCMEREKV	Plaintiffs' Response To Switzer Motion For Summary Judgment	Cheri C. Copsey
	DECL	TCMEREKV	Declaration Of Eric R. Clark In Opposition To Defendant Switzer's Motion For Summary Judgment	Cheri C. Copsey
	DECL	TCMEREKV	Declaration Of Eric R. Clark In Opposition To Defendant A.O. Smith, Inc.'s Motion For Summary Judgment	Cheri C. Copsey
	MOTN	TCMEREKV	Plaintiffs' Motion To File Memorandum In Excess Of Page Limit In Opposition To A.O. Smith, Inc.'s Motion For Summary Judgment	Cheri C. Copsey
	MISC	TCMEREKV	Plaintiffs' Response In Opposition To, And I.R.C.P. 56(F) Motion For Continuance Of, A.O. Smith, Inc.'s Motion For Summary Judgment	Cheri C. Copsey
	DECL	TCMEREKV	Declaration Of Eric R. Clark In Support Of Plaintiffs' I.R.C.P. 56(F) Motion For Continuance Of A.O. Smith, Inc.'s Motion For Summary Judgment	Cheri C. Copsey
	AFFD	TCMEREKV	Affidavit Of Glen Stevick	Cheri C. Copsey
8/14/2014	ORDR	CCMASTLW	Order Granting Motion to File Memorandum In Excess of Page Limit	Cheri C. Copsey
	DCHH	CCMASTLW	Hearing result for Motion to Dismiss scheduled on 08/14/2014 02:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Mo/Dismiss Negligence Claim less than 50	Cheri C. Copsey
8/15/2014	NOTC	TCMEREKV	Notice To Vacate	Cheri C. Copsey

Date	Code	User	Judge
8/18/2014	ORDR	CCMASTLW	Order Granting Stipulation to Vacate and Reset Summary Judgment Scheduling Order and Vacating and Resetting the Oral Argument (10/30/14 @ 3:30pm - AO Smith's Mo/SJ)
	STIP	CCTHIEKJ	Stipulation to Vacate and Reset Summary Judgment Scheduling Order
8/19/2014	STIP	CCRADTER	Stipulation to Change Expert Witness Disclosure Deadlines
8/21/2014	ORDR	CCMASTLW	Order re Stipulation to Change Expert Witness Disclosure Deadlines
	REPL	CCGARCOS	Defendant's Switzer's Reply to Plaintiff's Response to Switzer's Motion for Summary Judgment
	NOTC	CCMURPST	Notice Duces Tecum of Continuing the Deposition Upon Oral Examination of David L. Saldivar, CPM, CCIM
8/22/2014	NOTC	TCMEREKV	Supplemental Notice Duces Tecum Of Continuing The Deposition Upon Oral Examination Of David L. Saldivar, CPM, CCIM
	AFFD	CCRADTER	Affidavit of Robert A Mills in Opposition to Sagecrest Poa's Motion for Summary Judgment
	MEMO	CCRADTER	First Rate's Memorandum in Opposition to Sagecrest Poa's Motion for Summary Judgment
	RSPN	CCHEATJL	Plaintiffs Response in Opposition to Defendant Sagecrest Multi-Family Property Owners Association Incs Motion for Summary Judgment
	DECL	CCHEATJL	Declaration of Eric R Clark in Opposition to Defendant Sagecrest Multi Family Property Owners Association Motion for Summary Judgment
8/27/2014	AMEN	CCMARTJD	Amended Subpoena Duces Tecum and Notice of Deposition of Dr. Carol Anderson
8/29/2014	MOSJ	CCBARRSA	Declaration of Eric R. Clark in Opposition to Defendant Tony Drost's Motion For Summary Judgment
	MOSJ	CCBARRSA	Plaintiffs' Response to Defendant Tony Drost's Motion For Summary Judgment
9/2/2014	MOTN	CCMARTJD	Motion for Leave to File a Supplemental Affidavit
	MOTN	CCMARTJD	Motion for Permission to File Reply to Plaintiffs Response in Opposition to Motion for Summary Judgment in Excess of Page Limit
	AFFD	CCMARTJD	Affidavit in Support of Motion for Summary Judgment
	RPLY	CCMARTJD	Reply to Plaintiffs Response in Opposition to Motion for Summary Judgment
9/9/2014	MOTN	TCMEREKV	Motion To File Reply In Excess Of Page Limit In Support Of Motion For Summary Judgment

Date	Code	User		Judge
9/9/2014	AFFD	TCMEREKV	Supplemental Affidavit Of Counsel Craig D. Stacey In Support Of Defendant's Motion For Summary Judgment	Cheri C. Copsey
	REPL	TCMEREKV	Reply In Support Of Motion For Summary Judgment	Cheri C. Copsey
9/10/2014	ORDR	CCMASTLW	Order Granting Motion to File A O Smith's Reply	Cheri C. Copsey
	MISC	CCMASTLW	A O Smith's Reply to Plaintiffs' Response in Opposition to A O Smith's Motion for Summary Judgment	Cheri C. Copsey
	ORDR	CCMASTLW	Order Granting Motion to File a Supplemental Affidavit	Cheri C. Copsey
	AFFD	CCMASTLW	Supplemental Affidavit of Matthew Walters	Cheri C. Copsey
	OPPO	CCREIDMA	Plaintiffs' Response in Opposition to Defendants Anfinson Plumbing LLP and Daniel Bakken's Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCREIDMA	Affidavit of Tyson E. Logan in Opposition to Defendants Anfinson Plumbing & Daniel Bakken's Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCRADTER	Affidavit of Robert A Mills in Opposition to Anfinson Plumbing's and Dniel Bakken's Motion for Summary Judgment	Cheri C. Copsey
	MEMO	CCRADTER	First Rate's Memorandum in Opposition to Motion for Summary Judgment	Cheri C. Copsey
	AFFD	CCRADTER	Affidavit of Bernard R Cuzzillo in opposition to Defendants Motion for Summary Judgment	Cheri C. Copsey
	RESP	CCRADTER	Defendant A.O. Smith, INC'S Response to Motion for Summary Judgment	Cheri C. Copsey
9/11/2014	DCHH	CCMASTLW	Hearing result for Motion for Summary Judgment scheduled on 09/11/2014 02:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Switzer less than 50	Cheri C. Copsey
9/15/2014	MOTN	CCVIDASL	Drosts Motion for Leave to File a Supplemental Affidavit	Cheri C. Copsey
	AFFD	CCVIDASL	Affidavit of Robert A Mills in Support of Defendant Tony Drosts Reply in Support of Motion for Summary Judgment Re Claims Against Tony Drost	Cheri C. Copsey
	RPLY	CCVIDASL	Defendant Tony Drosts Reply in Support of Motion for Summary Judgment Re Claims Against Tony Drost	Cheri C. Copsey
9/18/2014	STIP	CCTHIEKJ	Stipulated Motion for Leave to File Plaintiffs' Fourth Amended Complaint	Cheri C. Copsey
9/19/2014	ORDR	CCMASTLW	Order Granting Drost's Motion For Leave to File a Supplemental Affidavit	Cheri C. Copsey

Date	Code	User		Judge
9/19/2014	ORDR	CCMASTLW	Order Granting Motion to File 4th Amended Complaint	Cheri C. Copsey
9/24/2014	ORDR	DCDANSEL	Order Denying Switzer Summary Judgment	Cheri C. Copsey
9/25/2014	CERT	DCDANSEL	Certificate Of Mailing (as to Michael Sasser)	Cheri C. Copsey
9/26/2014	MISC	CCMARTJD	Defendants Anfinson Plumbings and Daniel Bakkens Joint Expert Witness Disclosure	Cheri C. Copsey
	MISC	CCMARTJD	Defendant A.O. Smiths Expert Disclosure	Cheri C. Copsey
	MISC	CCMARTJD	Defendants Expert Witness Disclosure	Cheri C. Copsey
	MISC	TCLAFFSD	Defendant Tony Drost's And First Rate Property Management Inc's Expert Witness Disclosure	Cheri C. Copsey
	MISC	TCLAFFSD	Defendant Sagecrest Multi-Family Property Owners' Association Inc's Expert Witness Disclosure	Cheri C. Copsey
9/29/2014	MISC	CCTHIEKJ	Defendant Switxer's Expert Witness Disclosure	Cheri C. Copsey
	MISC	CCVIDASL	Parties Disclosure of Trial Exhibits	Cheri C. Copsey
10/1/2014	RSPN	CCMCLAPM	Plaintiff Response in Opposition to First Rate Property Management Inc and Tony Drost's Motion for Summary Judgment	Cheri C. Copsey
	DECL	CCMCLAPM	Declaration of Michael F. Lutz in Opposition to Defendants First Rate Property Management Inc and Tony Drost's Motion for Summary Judgment	Cheri C. Copsey
	MOTN	TCMEREKV	Joint Motion To Strike	Cheri C. Copsey
	MEMO	TCMEREKV	Memorandum In Support Of Joint Motion To Strike	Cheri C. Copsey
	REPL	TCMEREKV	Joint Reply Memorandum To Defendant First Rate Property Management Inc.'s Opposition To Motion For Summary Judgment	Cheri C. Copsey
	REPL	TCMEREKV	Joint Reply Memorandum In Support Of Joint Motion For Summary Judgment	Cheri C. Copsey
10/3/2014	NOTS	TCMEREKV	Notice Of Service	Cheri C. Copsey
10/6/2014	AMEN	CCVIDASL	Defendant Switzers Amended Expert Witness Disclosure	Cheri C. Copsey
10/17/2014	MISC	CCMASTLW	Letter from George Reinhardt re mediation of case	Cheri C. Copsey
	RESP	CCGARCOS	Plaintiff's Response in Opposition to Defendants Kalsbeek, Arla, Schwab and Meisner's Motion to Dismiss Intentional Infliction of Emotional Harm Claim	Cheri C. Copsey
	MOSJ	TCLAFFSD	Motion For Summary Judgment	Cheri C. Copsey
	AFFD	TCLAFFSD	Affidavit Of Jon Kalsbeek	Cheri C. Copsey
	AFFD	TCLAFFSD	Affidavit Of Jay Arla	Cheri C. Copsey
	AFFD	TCLAFFSD	Affidavit Of Christopher Schwab	Cheri C. Copsey
	AFFD	TCLAFFSD	Affidavit Of David Meisner	Cheri C. Copsey

Date	Code	User	Judge
10/17/2014	MEMO	TCLAFFSD	Memorandum In Support of Defendants Kalsbeek, Arla, Schwab, & Meisner's Motion For Summary Judgment Cheri C. Copsey
10/21/2014	HRSC	CCHEATJL	Amended Notice Of Hearing Scheduled (Motion for Summary Judgment 11/13/2014 02:30 PM) Cheri C. Copsey
10/27/2014	ORDR	CCMASTLW	Scheduling Order Cheri C. Copsey
	HRSC	CCMASTLW	Hearing Scheduled (Motion for Summary Judgment 01/15/2015 03:30 PM) Kalsbeek, Arla, Schwab, Meisner Cheri C. Copsey
	STIP	TCMEREKV	Stipulation To Change Rebuttal Expert Disclosure Deadline Cheri C. Copsey
	REPL	TCMEREKV	Reply In Support Of Motion For Summary Judgment Cheri C. Copsey
10/29/2014	ORDR	CCMASTLW	Order re Stipulation to Change Rebuttal Expert Disclosure Deadline Cheri C. Copsey
	AMEN	TCMEREKV	Amended Notice Of Continuing The Deposition Duces Tecum Of Ben Davis Cheri C. Copsey
	AMEN	TCMEREKV	Defendant Tony Drost's And First Rate Property Management, Inc.'s Amended Expert Witness Disclosure Cheri C. Copsey
10/30/2014	DCHH	CCMASTLW	Hearing result for Motion for Summary Judgment scheduled on 10/30/2014 02:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Sagecrest POA less than 50 Cheri C. Copsey
	AMEN	CCRADTER	Fourth Amended Complaint and Demand for Jury Trial Cheri C. Copsey
11/3/2014	ORDR	CCMASTLW	Order Granting Drost's Motion for Leave to File a Supplemental Affidavit Cheri C. Copsey
	MISC	CCTHIEKJ	Defendant Switzer's Second Amended Expert Witness Disclosure Cheri C. Copsey
	ANSW	CCSCOTDL	Defendant Switzers Answer to Plaintiffs Fourth Amended Complaint and Demand for Jury Trial Cheri C. Copsey
	NOSV	CCBOYIDR	Notice Of Service of Plaintiffs' Third Set of Discovery Propounded to Defendant A.O. Smith Cheri C. Copsey
	RPLY	CCMCLAPM	Reply Memorandum in Support of Defendants Kalsbeek ARLA Schwab and Meisners Motion to Dismiss Intentional Infliction of Emotional Harm Claim Cheri C. Copsey
11/6/2014	DCHH	CCMASTLW	Hearing result for Motion for Summary Judgment scheduled on 11/06/2014 02:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Drost less than 50 Cheri C. Copsey

Date	Code	User	Judge
11/7/2014	ANSW	CCGARCOS	Defendant Sagecrest Multi-Family Property Owners' Association, INC.' Answer to Plaintiffs' Fourth Amended Complaint
11/13/2014	DCHH	DCJOHNSI	Hearing result for Motion for Summary Judgment scheduled on 11/13/2014 02:30 PM: District Court Hearing Held Court Reporter: madsen Number of Transcript Pages for this hearing estimated: Anfinson Plumbing & Bakken; AO Smith-50
11/14/2014	CONT	CCMASTLW	Continued (Motion for Summary Judgment 12/11/2014 03:30 PM) First Rate and Drost
	ORDR	CCMASTLW	Order Denying Sagecrest POA's Motion for Summary Judgment
	MISC	CCTHIEKJ	Plaintiffs' Disclosure of Rebuttal Expert Witnesses
11/20/2014	ANSW	CCMARTJD	Answer to Fourth Amended Complaint (Shockley for Daniel Bakken)
	MOTN	CCTHIEKJ	Plaintiffs' Motion to Strike Re: Affidavits of Defendants Jon Kalsbeek, Jay Arla, Chris Schwab, and David Meisner
	RSPS	CCMARTJD	Response in Opposition to Defendants Kalsbeek Arla Schwab and Meisners Motion for Summary Judgment
	DECL	CCMARTJD	Declaration of Tyson Logan in Opposition to Motion for Summary Judgment
11/26/2014	ORDR	CCMASTLW	Order Denying Anfinson Plumbing's and Daniel Bakken's Motion for Summary Judgment
12/4/2014	NOHG	CCVIDASL	Notice Of Hearing on Plaintiffs Motion to Strike Re Affidavits of Defendants Jon Kalsbeek Jay Arla Chris Schwab and David Meisner (Hearing Not Scheduled Due to Year is Missing on Date)
12/5/2014	RSPN	CCMCLAPM	Response in Opposition to Motion to Strike
	RPLY	CCMCLAPM	Reply in Support of Motion for Summary Judgment
	AFFD	CCMCLAPM	Affidavit of John M Howell
	AMEN	CCRADTER	Amended Notice of Hearing on Plaintiffs' Motion to Strike RE: Affidavits of Defendants Jon Kalsbeek, JAy Arla, Chris Schwab, and David Meisner 1.15.15 @ 3:30 PM
12/11/2014	DCHH	CCMASTLW	Hearing result for Motion for Summary Judgment scheduled on 12/11/2014 03:30 PM: District Court Hearing Held MOTION DENIED Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: First Rate and Drost less than 50

Date	Code	User	Judge
12/18/2014	ANSW	CCSCOTDL	Defendant A.O. Smiths Answer to Fourth Amended Complaint and Demand for Jury Trial
	WITN	CCSCOTDL	Defendant A.O. Smiths Supplemental Expert Witness Disclosure
12/19/2014	ANSW	CCBOYIDR	Answer to Fourth Amended Complaint and Demand for Jury Trial (Fuhrman for Anfinson Plumbing)
12/29/2014	ORDR	CCMASTLW	Order Denying First Rate Property Management's Motion for Summary Judgment
1/7/2015	REPL	TCLAFFSD	Plaintiffs' Reply In Support Of Motion To Strike Re: Affidavits Of Defendants Jon Kalsbeek, Jay Arla, Chris Schwab & David Meisner
	NOTC	CCMARTJD	Notice of Change of Firm (John Howell of Barnum Howell PLLC)
1/8/2015	RESP	CCRADTER	Response To Plaintiffs' Motion to Continue Summary Judgment Hearing Under Rule 56(f)
1/9/2015	MOTN	CCRADTER	Plaintiffs' Motion to Reconsider Order on Switzer Summary Judgment RE: Duty to Warn
1/12/2015	ANSW	CCSCOTDL	Answer to Plaintiffs Fourth Amended Complaint and Demand for Jury Trial (John Howell for Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner)
	NOSV	CCMURPST	Notice Of Service (01/12/2015)
1/15/2015	NOTC	CCMASTLW	Notice of Intent to Reconsider Court's Decision Denying Sagecrest's Summary Judgment
	HRSC	CCMASTLW	Hearing Scheduled (Hearing Scheduled 03/12/2015 02:30 PM) Reconsideration - Sagecrest's Summary Jdmt & Switzer's Summary Judgment
	DCHH	CCMASTLW	Hearing result for Hearing Scheduled scheduled on 01/15/2015 03:30 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Kalsbeek, Arla, Schwab, Meisner - Mo/SJ & Mo/Dismiss; AO Smith Mo/SJ; Mo/Strike; sched conference less than 50
1/16/2015	HRSC	CCMASTLW	Hearing Scheduled (Scheduling Conference 02/13/2015 09:00 AM)
1/27/2015	ORDR	CCMASTLW	Order Granting Defendant A.O. Smith's Motion for Summary Judgment
2/4/2015	NOTC	DCDANSEL	Notice of Hearing on Forbush Motion to Reconsider Switzer Summary Judgment Decision Re: Duty to Warn
2/13/2015	HRHD	DCJOHNSI	Hearing result for Scheduling Conference scheduled on 02/13/2015 09:00 AM: Hearing Held

Date	Code	User	Judge
2/13/2015	MOTN	CCRADTER	Defendants Anfinson Plumbing, LLP's and Daniel Bakken's Motion to Reconsider
	AFFD	CCRADTER	Affidavit of Robert J Rawlings in Support of Defendants Anfinson Plumbing, LLP's and Daniel Bakken's Motion to Reconsider
	AFFD	CCRADTER	Affidavit of Christopher P Graham in Support of Defendants Anfinson Plumbing, LLP's and Daniel Bakken's Motion to Reconsider
	MEMO	CCRADTER	Defendants Anfinson Plumbing, LLP's and Daniel Bakken's Memorandum in Support of Motion to Reconsider
	CONT	DCDANSEL	Reset (Hearing Scheduled 04/16/2015 03:00 PM) Reconsideration - Sagecrest's Summary Jdmt & Switzer's Summary Judgment
	NOTC	DCDANSEL	Notice of Hearing on Motions to Reconsider
	NOTC	DCDANSEL	CORRECTED Notice of Hearing on Motions to Reconsider
2/17/2015	ORDR	CCMASTLW	Amended Order Governing Proceedings and Setting Trial
	HRSC	CCMASTLW	Hearing Scheduled (Jury Trial 02/08/2016 09:00 AM) 15d (9 - 5, 5d/wk)
	HRSC	CCMASTLW	Hearing Scheduled (Pretrial Conference 01/07/2016 04:30 PM) Final
	HRSC	CCMASTLW	Hearing Scheduled (Pretrial Conference 01/28/2016 04:30 PM) Concluding
3/2/2015	BREF	CCGARCOS	Plaintiffs' Supplemental Brief RE: Defendant Sagecrest Poa's Motion for Summary Judgment
	DECL	CCGARCOS	Declaration of Michael F. Lutz to Accompany Plaintiff's Supplemental Brief RE: Defendant Sagecrest Poa's Motion for Summary Judgment
	MEMO	CCRADTER	Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Memorandum in Support of Reconsideration of Poa's Motion for Summary Judgment
	AFFD	CCRADTER	Affidavit of Counsel Michael J Elia in Support of Defendant Sagecrest Multi Family Property Owners Association, Inc.'s Memornadum in Support of Poa's Motion for Summary Judgment
	AFFD	CCRADTER	Affidavit of Robert A Mills RE: FRPM's Opposition to Reconsideration of SPOA's MSJ
	MEMO	CCRADTER	First Rate's Memorandum in Response to the Plaintiffs' Motion to Reconsider Order on Switzer MSJ
	MEMO	CCRADTER	First Rate's Memorandum in Opposition to the Reconsideration of the Decision Denying Sagecrest POA's Motion for Summary Judgment
3/6/2015	AFFD	CCBARRSA	Affidavit of Michael L Haman

Date	Code	User	Judge
3/6/2015	MEMO	CCBARRSA	Defendant Switzer's Memorandum in Response to Court's Intent to Reconsider Sagecrest Summary Judgment
	MEMO	CCBARRSA	Defendant Switzer's Memorandum in Opposition to Plaintiffs' Motion to Reconsider
3/9/2015	MOTN	CCWEEKKG	Plaintiff's Motion to Reconsider Denial of IRCP 56(f) Continuance RE: Defendant A.O. Smith's Motion for Summary Judgment
	DECL	CCWEEKKG	Declaration of Tyson E. Logan In Support of Plaintiff's Motion to Reconsider Denial of IRCP 56(f) Continuance RE: Defendant A.O. Smith's Motion for Summary Judgment Filed
	REPL	TCLAFFSD	Defendant Sagecrest Multi Family Property Owners' Association, Inc's Reply To Plaintiffs' Supplemental Brief Re: Defendant Sagecrest POA's Motion For Summary Judgment
	REPL	TCLAFFSD	Defendant Sagecrest Multi Family Property Owners' Association, Inc's Reply To First Rate's Memorandum In Opposition To The Reconsideration Of The Decision Denying Sagecrest POA's Motion For Summary Judgment
	REPL	TCLAFFSD	Defendant Sagecrest Multi Family Property Owners' Association, Inc's Reply To Defendant Switzer's Memorandum In Response To Court's Intent To Reconsider Sagecrest Summary Judgment
	AFFD	TCLAFFSD	Supplemental Affidavit Of Counsel Michael J Elia In Support Of Defendant Sagecrest Multi Family Property Owners' Association, Inc's Memorandum In Support Of Reconsideration Of Poa's Motion For Summary Judgment
	RESP	CCRADTER	Plaintiffs' Response to POA's Supplemental Brief RE: Motion for Summary Judgment
	REPL	CCRADTER	Reply in Support of Plaintiffs' Motion to Reconsider Order on Switzer Summary Judgment RE: Duty to Warn
3/13/2015	NOTH	TCMEREKV	Notice Of Hearing On Plaintiffs' Motion To Reconsider Denial Of I.R.C.P. 56(F) Continuance RE: Defendant A.O. Smith's Motion For Summary Judgment
3/27/2015	OPPO	CCMYERHK	A.O. Smith, Inc's Opposition To Defendants Anfinson Plumbing, LLP And Daniel Bakken's Motion To Reconsider
	AFFD	CCMYERHK	Affidavit Of Matthew L Walters In Support Of Defendant A.O. Smith, Inc's Opposition To Defendants Anfinson Plumbing, LLC And Daniel Bakken's Motion To Reconsider

Date	Code	User	Judge
4/3/2015	REPL	CCHOLDKJ	Defendants Anfinson Plumbing LLP's and Daniel Bakken's Reply Memorandum in Support of Motion to Reconsider
4/9/2015	HRSC	DCDANSEL	Hearing Scheduled (Hearing Scheduled 05/14/2015 03:30 PM) Plaintiff's Motion to Reconsider Denial of IRCP 56(f) Continuance Re: AO Smith MSJ
4/13/2015	ORDR	CCMASTLW	Order Granting Defendants Kalsbeek, Arla, Schwab and Meisner's Motion for Summary Judgment
	CDIS	CCMASTLW	Civil Disposition entered for: Arla, Jay, Defendant; Karlsbek, Jon, Defendant; Meisner, David, Defendant; Schwab, Chris, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 4/13/2015
4/16/2015	DCHH	CCMASTLW	Hearing result for Hearing Scheduled scheduled on 04/16/2015 03:00 PM: District Court Hearing Held Court Reporter: Kim Madsen Number of Transcript Pages for this hearing estimated: Reconsideration - Sagecrest's Summary Jdmt & Switzer's Summary Judgment less than 50
4/21/2015	ORDR	CCMASTLW	Order Denying Defendants Anfinson Plumbing and Daniel Bakken's Motion to Reconsider
5/11/2015	HRVC	CCMASTLW	Hearing result for Hearing Scheduled scheduled on 05/14/2015 03:30 PM: Hearing Vacated Plaintiff's Motion to Reconsider Denial of IRCP 56(f) Continuance Re: AO Smith MSJ
	NOTC	CCBOYIDR	Notice of Withdrawal of Plaintiffs' Motion to Reconsider Denial Continuance RE: Defendant A.O. Smith's Motion for Summary Judgment
5/26/2015	ORDR	CCMASTLW	Order re Motions for Reconsideration of Sagecrest POA and Switzer Summary Judgment Decisions
7/16/2015	NOTS	CCSNELNJ	Notice Of Service of Defendnt Anfinson Plumbing LLP'S Second Set of Iterrogatories and Request for Production to Plaintiff's Travis Forbush, Gretchen Hymas and Breanna Halowell
7/23/2015	STIP	CCGARCOS	Stipulation for Dismissal with Prejudice of Plaintiffs' Claims Against Defendants FRPM, DROST, SWITZER, AND TRUST
7/24/2015	ORDR	CCMASTLW	Order of Dismisssal With Prejudice of Plaintiffs' Claims Against Defendants FRPM, Drost, Switzer and Trust
	CDIS	CCMASTLW	Civil Disposition entered for: First Rate Property Management, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 7/24/2015

Date	Code	User	Judge
7/24/2015	CDIS	CCMASTLW	Civil Disposition entered for: Drost, Tony, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 7/24/2015
	CDIS	CCMASTLW	Civil Disposition entered for: Switzer, Matthew E, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 7/24/2015
	CDIS	CCMASTLW	Civil Disposition entered for: Matthew E Switzer Trust,, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 7/24/2015
8/17/2015	NOTS	TCLAFFSD	Notice Of Service
8/28/2015	NOTC	TCHOLLJM	Plaintiffs' Counsel's Notice Of Withdrawal As Counsel Of Record For Plaintiffs And Notice Of Withdrawal As Local Counsel For Attorneys Ulmer And Logan
9/10/2015	WITN	CCHEATJL	Defendants Anfinson Plumbing's And Daniel Bakken's Joint Expert Witness Disclosure
9/23/2015	MOTN	CCGRANTR	Motion for Substitution of Local Counsel
	AFFD	CCGRANTR	Affidavit of Charles F Peterson
9/24/2015	ORDR	CCMASTLW	Order Granting Motion for Substitution of Local Counsel (Charles Peterson as local counsel for Bryan Ulmer and Tyson Logan)
9/30/2015	NOTC	CCBARRSA	Joint Notice Duces Tecum of Taking Deposition Upon Oral Examination of Expert Trent Holmberg, M.D
	NOTC	CCBARRSA	Joint Notice Duces Tecum of Taking Deposition Upon Oral Examination of Expert Paul Randle, Ph.D
10/2/2015	NOTD	CCMARTJD	Notice Of Taking Deposition of Robert Rawlings
10/16/2015	NOTD	CCGARCOS	Amended Joint Notice Duces Tecum Of Taking Deposition Upon Oral Examination of Expert Paul Randle, Ph.D.
10/28/2015	HRSC	CCNELSRF	Hearing Scheduled (Status 11/23/2015 03:00 PM)
		CCNELSRF	Notice of Hearing 11/23/15 @ 3 pm
11/2/2015	NOTC	CCBARRSA	Notice of Video Deposition of Joellen Gill
11/23/2015	DCHH	CCNELSRF	Hearing result for Status scheduled on 11/23/2015 03:00 PM: District Court Hearing Held Court Reporter: Casey Redlich Number of Transcript Pages for this hearing estimated:Less than 50

Date	Code	User	Judge
1/7/2016	DCHH	CCNELSRF	Hearing result for Pretrial Conference scheduled on 01/07/2016 04:30 PM: District Court Hearing Held Court Reporter: Christie Valcich Number of Transcript Pages for this hearing estimated: 50
	HRVC	CCNELSRF	Hearing result for Pretrial Conference scheduled on 01/28/2016 04:30 PM: Hearing Vacated Concluding
2/4/2016	HRVC	CCNELSRF	Hearing result for Jury Trial scheduled on 02/08/2016 09:00 AM: Hearing Vacated 15d (9 - 5, 5d/wk)
	ORDS	CCNELSRF	Order Of Dismissal w/ Prej
	JDMT	CCNELSRF	Final Judgment
	CDIS	CCNELSRF	Civil Disposition entered for: Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff; Anfinson Plumbing, Defendant; Bakken, Daniel, Defendant. Filing date: 2/4/2016
	STAT	CCNELSRF	STATUS CHANGED: Closed
2/18/2016	AFFD	CCFERGLL	Affidavit Of Michael J Elia In Support Of Defendant Sagecrest Multi-Family Property Owners Association Incs Memorandum Of Costs
	MEMO	CCGARCOS	Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Memorandum of Costs
	MECO	CCBARRSA	Defendants Kalsbeek, Arla, Schwab and Meisner's Verified Memorandum of Cost
3/9/2016	ORDR	CCNELSRF	Order for Costs \$19,869.09
	ORDR	CCNELSRF	Order Granting Costs as of Right to Defendants Kalsbeek, Arla, Schwab and Meisner (\$15,406.95)
	JDMT	CCNELSRF	Judgment (\$15,406.95)
	CDIS	CCNELSRF	Civil Disposition entered for: Sagecrest Multi Family Property Owners,, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 3/9/2016
	CDIS	CCNELSRF	Civil Disposition entered for: Arla, Jay, Defendant; Karlsbek, Jon, Defendant; Meisner, David, Defendant; Schwab, Chris, Defendant; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 3/9/2016
3/17/2016	NOTA	CCATKIFT	NOTICE OF APPEAL
	APSC	CCATKIFT	Appealed To The Supreme Court
3/21/2016	JDMT	CCNELSRF	Judgment \$19,869.09

Date	Code	User	Judge
3/21/2016	CDIS	CCNELSRF	Civil Disposition entered for: Sagecrest Multi Family Property Owners,, Defendant; Forbush, Travis, Plaintiff; Halowell, Breanna, Plaintiff; Hymas, Gretchen, Plaintiff. Filing date: 3/21/2016
3/31/2016	REQU	CCBARRSA	Request for Additional Documents to be Included in the Clerk's Record
4/29/2016	NOTC	TCWEGEKE	Notice of Transcript Lodged - Supreme Court No. 44053

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Attorneys for Defendants Jon Kalsbeek,
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NO. _____ FILED _____
A.M. _____ P.M. *cf*

ORIGINAL

JUN 12 2014

CHRISTOPHER D. RICH, Clerk
By PATRICK McLAUGHLIN
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

**DEFENDANTS KALSBECK, ARLA,
SCHWAB AND MEISNER'S MOTION
TO DISMISS NEGLIGENCE CLAIM**

COME NOW Defendants Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner, by and through their counsel of record, John M. Howell of the firm Brassey, Crawford & Howell, PLLC, and hereby submit this Motion to Dismiss Plaintiff's negligence claim. This Motion is based on Idaho R. Civ. P. 12(b)(6), the record and pleadings filed in this matter, and the supporting memorandum filed contemporaneously herewith.

DEFENDANTS KALSBECK, ARLA, SCHWAB AND MEISNER'S MOTION TO DISMISS NEGLIGENCE CLAIM- 1

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pvm

DATED this 12th day of June, 2014.

BRASSEY, CRAWFORD & HOWELL, PLLC

By 

John M. Howell, Of the Firm
Attorneys for Defendants Jon Kalsbeek, Jay
Arla, Christopher Schwab and David Meisner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, 2014, I served a true and correct copy of the foregoing, upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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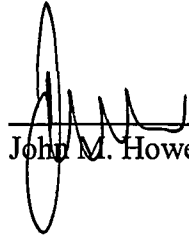
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John M. Howell

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Beth
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NO. _____
A.M. _____ FILED P.M. 4

JUN 12 2014

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Attorneys for Defendants Jon Kalsbeek,
Jay Arla, Christopher Schwab and David Meisner

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

.....
TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

.....
Case No. CV PI 1304325

**MEMORANDUM IN SUPPORT OF
DEFENDANTS KALSBECK, ARLA,
SCHWAB AND MEISNER'S MOTION
TO DISMISS NEGLIGENCE CLAIM**

COME NOW Defendants Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner,
by and through their counsel of record, John M. Howell of the firm Brassey, Crawford & Howell,
PLLC, and hereby submit this memorandum in support of their Motion to Dismiss Negligence
Claim.

PM

I. INTRODUCTION

Plaintiffs assert two claims against Defendants Jon Kalsbeek, Jay Arla, Chris Schwab, and David Meisner (collectively hereinafter, the “POA Officers”): (1) negligence; and (2) intentional infliction of emotional harm. Dismissal of Plaintiffs’ negligence claim against the individual POA Officers is appropriate because the Third Amended Complaint alleges that the POA Officers acted in their respective capacities as members of Defendant Sagecrest Multi-Family Property Owner’s Association, Inc. (“Sagecrest”) at all relevant times, and the Third Amended Complaint also fails to allege that the POA Officers owed any individual duty to the Plaintiffs.

II. FACTUAL AND PROCEDURAL HISTORY

The Court is amply familiar with the historical facts of this case, and as only the allegations set forth in Plaintiffs’ Third Amended Complaint (“TAC”) are relevant to the POA Officers’ motion to dismiss, such facts need not be repeated here. Procedurally, Ms. Halowell and Mr. Forbush’s parents, Gretchen Hymas and Travis Forbush, filed suit on March 7, 2013. *See, Complaint.* Plaintiffs amended their complaint the next day. *See, Amended Complaint.* Plaintiffs, with leave of the Court, filed their second amended complaint on August 2, 2013. *See, Second Amended Complaint.* Plaintiffs, with leave of the Court, filed the TAC on April 11, 2014. *See, Third Amended Complaint.* Plaintiffs have moved for leave to file a Fourth Amended Complaint, which motion is currently pending before the Court and is set for hearing on July 3, 2014.¹ *See, Plaintiffs’ Third Motion to Amend Complaint.*

¹ Based on Plaintiffs’ proposed Fourth Amended Complaint, the POA Officers’ Motion to Dismiss Negligence Claim would remain unchanged with regards thereto. The relevant paragraphs of the TAC that are substantive to this Motion are nearly identical to the proposed Fourth Amended Complaint, the only significant difference being that the numbering of the paragraphs changed slightly.

The TAC alleges that all four of the POA Officers acted in their capacity as officers of the Sagecrest POA at all times relevant to the claims and allegations set forth therein:

“At all times relevant to these proceedings, Jon Kalsbeek was acting as the President of the Sagecrest Multi Family Property Owner’s Association, Inc., and had knowledge of the dangerous conditions that existed at the Sagecrest Complex. Mr. Kalsbeek resides in Reno, Nevada.” TAC, ¶ 5 (emphasis added).

“At all times relevant to these proceedings, Jay Arla was acting as the Vice-President of the Sagecrest Multi Family Property Owner’s Association, Inc., and had knowledge of the dangerous conditions that existed at the Sagecrest Complex. Mr. Arla resides in Portland, Maine.” TAC, ¶ 6 (emphasis added).

“At all times relevant to these proceedings, Chris Schwab was acting as the Secretary of the Sagecrest Multi Family Property Owner’s Association, Inc., and had knowledge of the dangerous conditions that existed at the Sagecrest Complex. Mr. Schwab resides in Cupertino, California.” TAC, ¶ 7 (emphasis added).

“At all times relevant to these proceedings, David Meisner was acting as the Treasurer of the Sagecrest Multi Family Property Owner’s Association, Inc., and had knowledge of the dangerous conditions that existed at the Sagecrest Complex. Mr. Meisner resides in Meridian, Idaho.” TAC, ¶ 8 (emphasis added).

The TAC alleges that Sagecrest is an Idaho non-profit corporation. TAC, ¶ 4.

The TAC, in its 190 paragraphs, makes only four factual allegations regarding the individual POA Officers:

“On information and belief, First Rate informed the president and officers of the Sagecrest POA and building owner the trustee of the Matthew E. Switzer, Trust of the dangerous conditions caused by the defective water heaters well before November 10, 2012. However, despite this knowledge, none of these defendants took the appropriate action to rectify or alleviate the deadly situation that existed in Building 46 and throughout the Sagecrest complex.” TAC, ¶ 33.

“Following PFC Forbush’s death, the Sagecrest POA, and each of its officers named herein sent a letter to First Rate prohibiting First Rate from warning other tenants of the dangers at the complex. ‘I am instructing you to make no comments and to have no discussion with anyone, whether media representatives, tenants, owners, or anyone concerning the recent events at Sagecrest involving the death of a young man as the alleged result of CO poisoning.’” TAC, ¶ 43.

“In September 2011, the Sagecrest Board of Directors approved a contract with Engineering Consultants Incorporated “ECI,” a local engineering firm, to conduct a ‘Water Heater Site Investigation’ at Sagecrest. ECI confirmed the problem was with the ‘flame arrestor’ or intake vent clogging on A.O. Smith water heaters and reported its findings to the Sagecrest Board of Directors and First Rate.” *TAC*, ¶ 50.

“Defendant Kalsbeek interceded after the March 2012 meeting with Intermountain Gas and directed First Rate personnel to disregard the testing procedures as instructed by Intermountain Gas. Kalsbeek directed First Rate not to test the water heater flu, but to test in the apartment.” *TAC*, ¶ 54.

III. GOVERNING LAW

Rule 12(b)(6) of the Idaho Rules of Civil Procedure permits a defendant to assert the defense that a plaintiff has failed to state a claim upon which relief may be granted. “On a motion to dismiss pursuant to I.R.C.P. 12(b)(6), the court looks only at the pleadings, and all inferences are viewed in favor of the non-moving party.” *Burghart v. Carlin*, 151 Idaho 730, 731 (Ct. App. 2011). “[T]he question then is whether the non-movant has alleged sufficient facts in support of his claim which, if true, would entitle him to relief.” *Rincover v. State, Dep’t of Finance, Securities Bureau*, 128 Idaho 653, 656 (1996). “The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims.” *Burghart*, 151 Idaho at 731.

IV. DISCUSSION

The TAC asserts two claims against the POA Officers: (1) negligence; and (2) intentional infliction of emotional harm. Dismissal of Plaintiffs’ negligence claim against the individual POA Officers is appropriate because the TAC alleges that the POA Officers acted in their respective capacities as officers of the Sagecrest POA at all times, and the TAC also fails to allege that the POA Officers owed any individual duty to the Plaintiffs.

To sustain a claim of negligence under Idaho law, a plaintiff must establish: “(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach

of duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Beers v. Corp. of Pres. of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 316 P.3d 92, 97 (2013) (citing *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 399 (1999)).

The Idaho Supreme Court has stated that "one owes a duty to every person in our society to use reasonable care to avoid injury to the other person in any situation in which it could be reasonably anticipated or foreseen that a failure to use such care might result in such injury." *Doe v. Garcia*, 131 Idaho 578, 581 (1998). The Supreme Court has since clarified the seemingly broad nature of this statement: "Indeed, we abrogated the holding of *Garcia* in *Hunter v. State, Dep't of Corr., Div. of Prob. & Parole*, 138 Idaho 44, 50, 57 P.3d 755, 761 (2002), holding that *Garcia* 'extend[ed] the duty of an employer too far.' Otherwise, the general rule that '[t]here is ordinarily no affirmative duty to act to assist or protect another absent unusual circumstances, which justify imposing such an affirmative responsibility' would be devoid of meaning." *Beers*, 316 P.3d at 98.

In *Beers*, the Supreme Court re-stated the Idaho law of duty: "Absent unusual circumstances, a person has no duty to prevent harm to another, regardless of foreseeability. Idaho law recognizes two circumstances in which a person has an affirmative duty of care to another: a special relationship or an assumed duty based on an undertaking." *Id.*

The first circumstance giving rise to an affirmative duty of care is the existence of a special relationship. *Id.*; See also *Rees v. State, Dep't of Health & Welfare*, 143 Idaho 10, 15 (2006) ("An affirmative duty to aid or protect arises only when a special relationship exists between the parties."). A special relationship exists under one of two possible conditions: "(a) a special relation exists between the actor and a third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the

other a right to protection.” *Beers*, 316 P.3d at 98. Examples of special relationships recognized by Idaho law include “a parent’s duty to control his child, an employer’s duty to control an employee while at work, or a law enforcement officer’s duty to control a dangerous prisoner.” *Id.* (citing *Turpen v. Granieri*, 133 Idaho 244, 248 (1999)).

The second circumstance giving rise to an affirmative duty of care is an assumed duty based on an undertaking. “Even when an affirmative duty generally is not present, a legal duty may arise if one voluntarily undertakes to perform an act, having no prior duty to do so.” *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 350 (2008). “In such a case, the acting party has a duty to perform that act in a non-negligent manner.” *Beers*, 316 P.3d at 100. “When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed.” *Martin v. Twin Falls Sch. Dist. No. 411*, 138 Idaho 146, 150 (2002). For example, “[a] beach-goer may assume a duty to rescue a drowning swimmer in a non-negligent manner by undertaking to do so, but that same beach-goer has no obligation to rescue anyone else.” *Beers*, 316 P.3d at 100.

It is significant to bear in mind that Plaintiffs must allege a duty owed to them by each of the POA Officers individually in order to state a valid claim of negligence against the POA Officers. The TAC unambiguously asserts that the POA Officers were acting within their respective capacities as officers of the Sagecrest POA at all relevant times. *TAC*, ¶¶ 5-8. Accordingly, as regarding the individual liability of the POA Officers, the inquiry necessarily ends. *See* I.C. § 30-3-39 (“A member of a [non-profit] corporation is not, as such, personally liable for the acts, debts, liabilities or obligations of the corporation.”); *Washington Fed. Sav. v. Van Engelen*, 153 Idaho 648, 654 (2012) (“Absent grounds to pierce the corporate veil, a corporation is a separate entity from its shareholders, and a limited liability company is a separate entity from its members.”).

Even assuming *arguendo* and contrary to the plain, unambiguous allegations set forth in the TAC, that the POA Officers acted individually at some relevant time, the TAC fails to allege an individual duty on the part of any of the POA Officers. The TAC, in its 190 paragraphs, makes only four factual allegations regarding the individual POA Officers:

“On information and belief, First Rate informed the president and officers of the Sagecrest POA and building owner the trustee of the Matthew E. Switzer, Trust of the dangerous conditions caused by the defective water heaters well before November 10, 2012. However, despite this knowledge, none of these defendants took the appropriate action to rectify or alleviate the deadly situation that existed in Building 46 and throughout the Sagecrest complex.” TAC, ¶ 33.

“Following PFC Forbush’s death, the Sagecrest POA, and each of its officers named herein sent a letter to First Rate prohibiting First Rate from warning other tenants of the dangers at the complex. ‘I am instructing you to make no comments and to have no discussion with anyone, whether media representatives, tenants, owners, or anyone concerning the recent events at Sagecrest involving the death of a young man as the alleged result of CO poisoning.’” TAC, ¶ 43.

“In September 2011, the Sagecrest Board of Directors approved a contract with Engineering Consultants Incorporated “ECI,” a local engineering firm, to conduct a ‘Water Heater Site Investigation’ at Sagecrest. ECI confirmed the problem was with the ‘flame arrestor’ or intake vent clogging on A.O. Smith water heaters and reported its findings to the Sagecrest Board of Directors and First Rate.” TAC, ¶ 50.

“Defendant Kalsbeek interceded after the March 2012 meeting with Intermountain Gas and directed First Rate personnel to disregard the testing procedures as instructed by Intermountain Gas. Kalsbeek directed First Rate not to test the water heater flu, but to test in the apartment.” TAC, ¶ 54.

Paragraph 33 concerns the POA Officers’ general knowledge of allegedly defective water heaters at Sagecrest. Paragraph 43 is irrelevant as it concerns events subsequent to the damage sustained. Paragraph 50 concerns an engineering study. Paragraph 54 concerns knowledge of testing results and the implementation of procedures. None of these allegations against the POA Officers can be construed in any manner as alleging the existence of a special relationship between any of the individual POA Officers and the Plaintiffs, nor can these allegations be construed in any manner as

alleging that any of the POA Officers assumed or otherwise undertook an individual, affirmative duty with regards to the Plaintiffs.

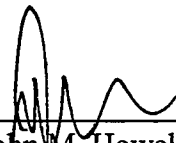
Accordingly, dismissal of Plaintiffs' negligence claim against the individual POA Officers is appropriate because the TAC alleges that the POA Officers acted in their respective capacities as officers of the Sagecrest POA at all relevant times, and the TAC also fails to allege that the POA Officers owed any individual duty to the Plaintiffs.

V. CONCLUSION

For the reasons stated herein, the POA Officers respectfully request that the Court grant their Motion to Dismiss Negligence Claim.

DATED this 12th day of June, 2014.

BRASSEY, CRAWFORD & HOWELL, PLLC

By 
John M. Howell, Of the Firm
Attorneys for Defendants Jon Kalsbeek, Jay
Arla, Christopher Schwab and David Meisner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, 2014, I served a true and correct copy of the foregoing, upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, d/b/a SAGECREST MULTI
FAMILY PROPERTY OWNERS"
ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

**DEFENDANT SAGECREST MULTI
FAMILY PROPERTY OWNERS'
ASSOCIATION, INC.'S MOTION FOR
SUMMARY JUDGMENT**

COMES NOW the above-named Defendant, by and through their attorneys of record, Moore & Elia, LLP, and pursuant to Rule 56 of the Idaho Rules of Civil Procedure, hereby respectfully request that the Court enter an order granting Defendant Sagecrest Multi-Family Property Owners' Association, Inc., summary judgment and dismiss all of Plaintiffs' claims against them with prejudice. Defendant contends that there is no genuine dispute as to any issue of material fact and that they are entitled to judgment as a matter of law.

This motion is supported by the *Memorandum in Support of Defendant Multi-Family Property Owners' Association, Inc.'s Motion for Summary Judgment and the Affidavit of*

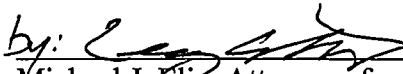
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Counsel Craig D. Stacey, which are all filed contemporaneously herewith. This motion is further supported by the pleadings, affidavits and other documents on file and on record in this action.

Oral argument is respectfully requested.

DATED this 24 day of July, 2014.

MOORE & ELIA, LLP

by: 

Michael J. Elia, Attorneys for Defendant
Sagecrest Multi-Family Property Owners' Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of July, 2014, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Eric R. Clark, Esq.
CLARK & ASSOCIATES, ATTORNEYS
PO Box 2504
Eagle, Idaho 83646
For Plaintiff

____ U.S. Mail, postage prepaid
____ Hand Delivered
____ Facsimile Transmission 208-939-7136
/ E-Mail: eclark@clark-attorneys.com

Tyson E. Logan
G. Bryan Ulmer
THE SPENCE LAW FIRM
PO Box 548
Jackson, WY 83001
For Plaintiff

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____ Facsimile Transmission 307-733-5248
/ E-Mail: logan@spencelawyers.com
ulmer@spencelawyers.com

James D. LaRue
Matthew Walters
ELAM & BURKE, PA
PO Box 1539
Boise, ID 83701
Elam & Burke, PA
For A.O Smith

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____ Hand Delivered
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/ E-Mail: jdl@elamburke.com
mlw@elamburke.com

Jason C. Palmer
Mark Tripp
BRADSHAW, FOWLER, PROCTOR & FAIR
GRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
For A.O Smith

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____ Hand Delivered
____ Facsimile Transmission 515-246-5808
/ E-Mail: palmer.jason@bradshawlaw.com
Tripp.mark@bradshawlaw.com

Michael Haman
HAMAN LAW OFFICE
923 North 3rd Street
PO Box 2155
Coeur d' Alene, Idaho 83816-2155
*For Mathew E. Switzer and the
Mathew E. Switzer Trust*

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____ Hand Delivered
____ Facsimile Transmission 208-676-1683
/ E-Mail: mlhaman.law@gmail.com

Robert A. Anderson
Robert A. Mills
ANDERSON, JULIAN & HULL LLP
PO Box 7426
Boise, Idaho 83707-7426
For First Rate Property Management & Drost

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____ Facsimile Transmission 208-344-5510
X E-Mail: raanderson@ajhlaw.com
rmills@ajhlaw.com

William A. Fuhrman
Christopher P. Graham
JONES GLEDHILL FURHRMAN
GOURLEY, P.A.
PO Box 1097
Boise, Idaho 83701
*For Anfinson Plumbing and H&H Properties,
LLC*

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Ø E-Mail: bfuhrman@idalaw.com
cgraham@idalaw.com

John M. Howell
BRASSEY CRAWFORD & HOWELL, PLLC
PO Box 1009
Boise, Idaho 83701-1009
*For Jon Kalsbeek, Jay Arla, Christopher
Schwab and David Meisner*

____ U.S. Mail, postage prepaid
____ Hand Delivered
____ Facsimile Transmission 208-344-7077
X E-Mail: jhowell@brassey.net

by:  _____
Michael J. Elia

ORIGINAL

Michael J. Elia (ISBN 5044)
Craig D. Stacey (ISBN 7996)
MOORE & ELIA, LLP
Post Office Box 6756
Boise, Idaho 83707
Telephone: (208) 336-6900
Facsimile: (208) 336-7031

NO. _____ FILED 4:41
A.M. _____ P.M.

JUL 24 2014

CHRISTOPHER D. RICH, Clerk
By KATRINA THIESSEN
DEPUTY

Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, d/b/a SAGECREST MULTI
FAMILY PROPERTY OWNERS'
ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

**AFFIDAVIT OF COUNSEL CRAIG D.
STACEY IN SUPPORT OF DEFENDANT
SAGECREST MULTI FAMILY
PROPERTY OWNERS' ASSOCIATION,
INC.'S MOTION FOR SUMMARY
JUDGMENT**

STATE OF IDAHO)
 : ss
County of Ada)

Craig D. Stacey, being first duly sworn upon oath deposes and states as follows:

1. I am one of the attorneys representing Defendant Sagecrest Multi-Family Property Owners' Association in this litigation.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Articles of Incorporation of Sagecrest Multi Family Property Owners' Association, Inc.

**AFFIDAVIT OF COUNSEL CRAIG D. STACEY IN SUPPORT OF DEFENDANT SAGECREST
MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC.'S MOTION FOR SUMMARY
JUDGMENT - 1**

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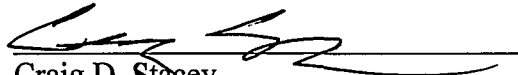
3. Attached hereto as Exhibit 2 is a true and correct copy of the Declaration of Covenants, Conditions and Restrictions of the Multi Family Portion of Sagecrest Subdivision.

4. Attached hereto as Exhibit 3 is a true and correct copy of the "POA Agreement" between First Rate Property Management, Inc. and Sagecrest Property Owners' Association.

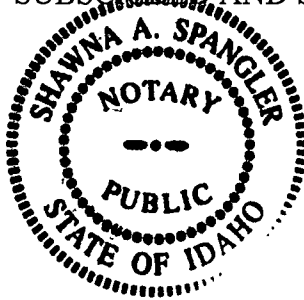
5. Attached hereto as Exhibit 4 is a true and correct copy of the First Rate Property Management, Inc. Rental Agreement with Matt Switzer as to building 46.

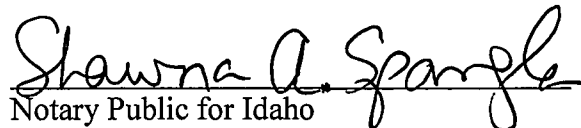
6. Attached hereto as Exhibit 5 is a true and correct copy of the deposition of Lizz Loop, pp 74-77.

DATED this 24 day of July, 2014.


Craig D. Stacey

SUBSCRIBED AND SWORN TO BEFORE me on this 24th day of July, 2014.




Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 2-15-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of July, 2014, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Eric R. Clark, Esq.
CLARK & ASSOCIATES, ATTORNEYS
PO Box 2504
Eagle, Idaho 83646
For Plaintiff

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G. Bryan Ulmer
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For Plaintiff

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ulmer@spencelawyers.com

James D. LaRue
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Boise, ID 83701
Elam & Burke, PA
For A.O Smith

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mlw@elamburke.com

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GRAVE, P.C.
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Tripp.mark@bradshawlaw.com

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*For Mathew E. Switzer and the
Mathew E. Switzer Trust*

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rmills@ajhlaw.com

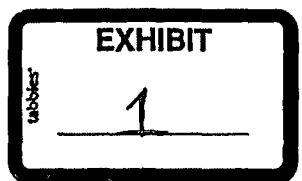
William A. Fuhrman
Christopher P. Graham
JONES GLEDHILL FURHRMAN
GOURLEY, P.A.
PO Box 1097
Boise, Idaho 83701
*For Anfinson Plumbing and H&H Properties,
LLC*

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☒ E-Mail: bfuhrman@idalaw.com
cgraham@idalaw.com

John M. Howell
BRASSEY CRAWFORD & HOWELL, PLLC
PO Box 1009
Boise, Idaho 83701-1009
*For Jon Kalsbeek, Jay Arla, Christopher
Schwab and David Meisner*

☐ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Facsimile Transmission 208-344-7077
☒ E-Mail: jhowell@brassey.net


Craig D. Stacey



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FILED EFFECTIVE

ARTICLES OF INCORPORATION
OF

SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC.

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SECRETARY OF STATE

KNOW ALL MEN BY THESE PRESENTS that these Articles of Incorporation have been executed by the undersigned for the purpose of forming a non-profit corporation in the State of Idaho under the Idaho Non-Profit Corporation Act.

Article 1. Name. The name of the corporation is Sagecrest Multi Family Property Owners' Association, Inc., hereinafter called the "Association."

Article 2. Registered office and agent. The registered office of the corporation is 3299 Davis Dr., Meridian, Idaho 83642, and its registered agent at that address is Russell D. Hunemiller.

Article 3. Incorporator. The name of the incorporator is Brian F. McColl and the incorporator's address is 420 W. Washington, Boise, Idaho 83702.

Article 4. Corporation's Address. The mailing address of the corporation shall be 3299 Davis Dr., Meridian, Idaho 83642.

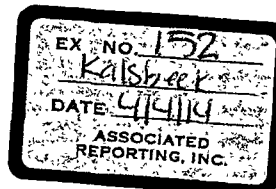
Article 5. Board of Directors. The affairs of this Association shall be managed by a Board of ~~Five~~ ^{Three} (3) Directors, who need not be members of the Association. The number of Directors may be increased by amendment of the By-Laws of the Association. The name and addresses of the persons who are to act in the capacity of Directors until the first annual meeting of members and until their successors are qualified are:

Russell Hunemiller	3299 Davis Dr., Meridian, Idaho 83642
Dick Marcum	14364 Highway 21, Boise, Idaho 83716
Brin McColl	420 W Washington Boise ID 83702

Election of the Board of Directors shall be by secret written ballot of the members. At such election, the members or their proxies may cast, in respect to each vacancy, as many votes as they are entitled to exercise under the provisions of the Associations' Bylaws. The persons receiving the largest number of votes shall be elected.

Article 6. Purposes and Powers of Association. This Association does not contemplate pecuniary gain or profit to the members thereof, and the specific purposes for which it is formed are to provide for maintenance, preservation and architectural control of those certain lots as established in the Declaration of Covenants, Conditions and Restrictions of Sagecrest Subdivision and any amendments thereto ("Declarations"), records of Ada County, Idaho, and to promote the health, safety and welfare of the residents within the subdivision established by the Declaration of Covenants, Conditions and Restrictions of Sagecrest Subdivision and any amendments thereto.

ARTICLES OF INCORPORATION - 1



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additions thereto as may hereafter be brought within the jurisdiction of this Association for this purpose to:

(a) exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in the Declarations as the same may be amended from time to time as therein provided, said Declarations and any Amendments thereto being incorporated herein as if set forth at length;

(b) fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the Declarations; to pay all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association;

(c) acquire (by gift, purchase or otherwise), own, hold improve, build upon, operate, maintain, convey, sell, lease, transfer, dedicate for public use or otherwise dispose of real or personal property in connection with the affairs of this Association;

(d) borrow money, and with the assent of two-thirds (2/3) of the Members, mortgage, pledge, deed in trust, or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred;

(e) participate in mergers and consolidations with other non-profit corporations organized for similar purposes provided that any such merger, consolidation or annexation shall have the assent of two-thirds (2/3) of the Members;

(f) have and to exercise any and all powers, rights, and privileges which a corporation organized under the Non-Profit Corporation Law of the State of Idaho by law may now or hereafter have or exercise.

Article 7. **Membership.** The Association shall have members whose qualifications and voting rights are set forth in the Declarations.

Article 8. **Assessment Liability.** Each member shall be liable for the payment of assessments provided for in the Declarations and for the payment and discharge of the liabilities of the Corporation as provided for in the Declarations and the By-Laws of the Corporation.

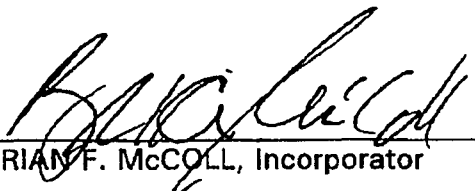
Article 9. **Duration.** The corporation shall exist perpetually.

Article 10. **Amendments.** Amendment of these Articles shall require the assent of seventy-five (75%) percent of the entire membership.

Article 11. **Beneficial Interest.** No part of the net earnings of the Association shall inure other than by providing management, maintenance and care of any property held by the Association, to the benefit of any member of the Association or other

private individual, and upon dissolution of this corporation no part of its assets shall be distributed to its members; rather its assets shall be distributed to the City of Meridian or to Ada County, or to a state or local government for a public purpose.

IN WITNESS WHEREOF, I have subscribed these Articles of Incorporation this _____ day of November, 2004.


BRIAN F. McCOLL, Incorporator



000063

ADA COUNTY RECORDER J. DAVID NAVARRO
BOISE IDAHO 06/22/07 04:34 PM
DEPUTY Vicki Allen
RECORDED - REQUEST OF
Stewart Title Company
107089360
AMOUNT 96.00
Re-record

ADA COUNTY RECORDER J. DAVID NAVARRO
BOISE IDAHO 11/18/04 11:49 AM
DEPUTY Bonnie Oberbillig
RECORDED - REQUEST OF
First American

AMOUNT - 93.00

31

104146558

Re-record to add Section 6.6A per Sagecrest Property Owners Association

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS
OF THE MULTI FAMILY PORTION OF SAGECREST SUBDIVISION**

This Declaration of Covenants, Conditions and Restrictions is made effective this 18th day of November, 2004, by the Sagecrest Development, L.L.C., an Idaho limited liability company ("Declarant").

RECITALS

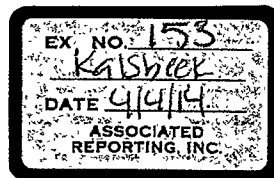
- A. Declarant is Sagecrest Development, L.L.C., which is the owner of certain real property in Ada County, Idaho, which is described in **Exhibit A**, and which is attached and incorporated by reference (hereinafter the "**Property**"), as further defined at **Article II**).
- B. The Property is the multi family portion of the plat of Sagecrest Subdivision. The other portions of the plat of Sagecrest Subdivision consist of a commercial section to the north of the Property and a commercial section to the east of the Property (collectively the "**Commercial Sections of Sagecrest Subdivision**").
- C. Sagecrest Subdivision is a re-plat of Lot 6 of Resolution Subdivision No. 1.
- D. Declarant has deemed it desirable to impose a general plan for the improvement and development of the Property by the adoption and establishment of covenants, conditions and restrictions upon the real property and each and every Residential Lot and portion thereof and upon the use, occupancy and enjoyment thereof; all for the purpose of enhancing and protecting the value, desirability and attractiveness of the Property.
- E. Declarant has deemed it desirable for the efficient preservation of the value, desirability and attractiveness of the Property, pursuant to the provisions of this Declaration, to create a non-profit corporation to which shall be delegated and assigned the powers of maintaining the Property as hereinafter provided, and administering and enforcing these covenants, conditions and restrictions and collecting and disbursing funds pursuant to the assessment and charges hereinafter created and referred to.

**ARTICLE I
DECLARATION**

Declarant hereby declares that each Residential Lot, parcel or portion of the Property, is and shall be held, sold, conveyed, leased, occupied and improved subject to the following terms, covenants, conditions, easements and restrictions, all of which are declared and agreed to be in furtherance of a general plan for the protection, maintenance, subdivision, improvement and sale of the Property, and to enhance the value, desirability and attractiveness of the Property. The terms, covenants, conditions, easements and restrictions set forth herein: (i) shall run with the land constituting the Property, and shall be binding upon all persons having or acquiring any

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
PORTION OF SAGECREST SUBDIVISION - 1**

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CONFIDENTIAL

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right, title or interest in the Property or any Residential Lot, parcel or portion thereof; (ii) shall inure to the benefit of every Residential Lot, parcel or portion of the Property and interest therein; (iii) shall inure to the benefit of and be binding upon Declarant's successors in interest, and each grantee or Owner and such grantees or Owner's respective successors in interest; and (iv) may be enforced by Declarant, by any Owner or such Owner's successors in interest, or by the Association as hereinafter described.

The Commercial Sections of Sagecrest Subdivision are not subject to any of the terms, covenants, conditions, easements and restrictions set forth herein unless otherwise specifically indicated herein.

Notwithstanding the foregoing, no provision of this Declaration shall be construed as to prevent or limit Declarant's right to complete development of the Property and to construct improvements thereon, nor limit Declarant's right to maintain model units, construction, sales, or leasing offices or similar facilities (temporary or otherwise) on any portion of the Property, nor Declarant's right to post signs incidental to construction, sales or leasing activities.

Declarant hereby further declares that each Residential Lot, parcel or portion of the Property shall further be held, sold, conveyed, encumbered and subject to the Master Declaration, as defined in Article II below, except as otherwise provided herein.

ARTICLE II DEFINITIONS

Articles: The Articles of Incorporation of the Sagecrest Multi Family Property Owners' Association.

Assessments: Those payments required of Association Members, including Regular, Special and Limited Assessments of the Association, and as further required in the Master Declaration.

Association: The Sagecrest Multi Family Property Owners' Association, which Association shall be deemed to be a "Sub Association" as that term is defined and used in Master Declaration.

Association Rules: Those rules and regulation promulgated by the Association governing conduct upon and use of the Property under the jurisdiction or control of the Association; the imposition of fines, fees and forfeitures for violations of Association Rules and use of Common Areas, and procedural matters for use in the conduct of the business of the Association.

Board: The Board of Directors of the Association.

Bylaws: The Bylaws of the Association.

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
PORTION OF SAGECREST SUBDIVISION - 2**

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Common Areas: All real property, fixtures, personal property and Improvements owned, leased or otherwise held now or in the future by the Association exclusively for the common use and enjoyment of the Owners, including:

- (a) Lot 60, Block 1 of Sagecrest Subdivision (the **"Driveway and Parking Lot"**), which lot includes, without limitation, the asphalt driving and parking area, concrete planters and parking dividers, parking striping, drainage catch basins, grease traps, and drainage beds underneath the asphalt surfaced areas, and mailbox clusters; and
- (b) Lot 64, Block 1 of Sagecrest Subdivision (the **"Recreational Center Lot"**), which lot includes, without limitation, the recreation center building, play area, pool and its landscaped areas, which Recreational Center Lot shall become part of the Common Area only upon the Association's acquisition of the same from the Declarant, which acquisition shall be evidenced by a deed conveying the Recreational Center Lot to the Association. Until such time as the deed is placed of record, Records of Ada County, Idaho, ownership of the Recreational Center Lot shall be retained by the Declarant.
- (c) The Drainage Lot (Lot 42, Block 1 of Sagecrest Subdivision).

Declarant: The Sagecrest Development, L.L.C., or its successor in interest, or any person or entity to whom the rights under this Declaration are expressly transferred by Sagecrest Development, L.L.C., or its successor.

Declarant Control Period: The period commencing on the date on which this Declaration is first recorded with the Office of Recorder of Ada County, Idaho and ending upon the first to occur of the following:

- (a) When 100% of the total number of the Residential Lots on the Property are no longer owned by the Declarant; or
- (b) When, in its discretion, Declarant so elects in writing.

Declaration: This Declaration of Covenants, Conditions and Restrictions for Multi Family Portion of Sagecrest, as it may be amended from time to time.

Drainage Facilities: All drainage catch basins, grease traps, and drainage beds underneath the asphalt surface areas, together with the Drainage Lot.

Four Plex: A residential building on each Residential Lot of the Property that is comprised of four separate single family residential units.

Improvement: Any structure, facility or system, or other improvement or object, whether permanent or temporary, which is erected, constructed or placed upon, under or in any portion of the Property, including but not limited to the Four Plexes, fences, driveways, Sidewalks, bicycle

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
PORTION OF SAGECREST SUBDIVISION - 3**

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paths, curbs, landscaping, signs, lights, mail boxes, electrical lines, pipes, pumps, ditches, waterways, drainage facilities, and fixtures of any kind whatsoever.

Lot: Any numbered Lot of land shown on the Multi Family Portion of the Plat.

Master Declaration: Master Declaration of Covenants, Conditions, Restrictions and Easements for Resolution Subdivision, as recorded with the Ada County Recorder's Office on September 25, 2001, as instrument number 102092801, and as may be hereafter amended. Said Master Declaration is incorporated herein by reference. When used in this Declaration the terms which are defined in the Master Declaration shall have the same meanings ascribed to them therein; provided, however, that any term defined in this Declaration shall have the meaning given herein.

Member: Each person or entity holding a membership in the Association.

Multi Family Portion: That portion of the Plat that consists of forty-eight (48) Residential Lots each improved with a Four Plex, the Recreational Center Lot, that portion of the Driving and Parking Lot that is contiguous to the Residential Lots, and the Drainage Lot.

Owner: The person or other legal entity, including Declarant, holding fee simple title of record to a Residential Lot and buyers under executory contracts of sale, but excluding those having an interest merely as security for the performance of an obligation.

Person: Any individual, partnership, corporation or other legal entity.

Plat: The plat of Sagecrest Subdivision as recorded at the office of Ada County Recorder, State of Idaho, which plat includes the Property.

Property: The real property described in Exhibit A.

Resolution Business Park, LLC: The Developer/Owner who executed the Master Declaration.

Resolution Business Park POA: The Resolution Business Park Property Owners' Association, Inc., an Idaho non-profit corporation.

Residential Lots: All Lots on the Multi Family Portion of the Plat, except the Recreational Center Lot, the Driving and Parking Lot, and the Drainage Lot.

Sidewalks: Any sidewalks and pedestrian paths on the Property, including the sidewalks that are on the Residential Lots in front of the Four Plexes and the perimeter sidewalk on the Residential Lots that is on the easterly, southerly and westerly perimeter of the Property.

Structure: The term "Structure" shall include all Four Plexes, all Improvements to the Recreational Center Lot, including the recreational center, pool and play area; and all asphalted areas, including the Driveway and Parking Lot.

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY PORTION OF SAGECREST SUBDIVISION - 4

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Subdivision: Multi Family Portion of Sagecrest Subdivision.

Tenant: Any person occupying a residential unit in a Four Plex, other than an Owner.

**ARTICLE III
NATURE OF OWNERSHIP/MAINTENANCE**

3.1 Title: Title to a Residential Lot may be held or owned by any person or entity and in any manner in which title to any other real property may be held or owned in the State of Idaho.

3.2 Inseparability: No ownership of a Residential Lot may be further divided and shall always be conveyed, devised, encumbered and otherwise affected only as a completed Lot. Notwithstanding the foregoing, it is contemplated that the Owner of any Four Plex will lease to separate Tenants the individual residential units of the Four Plex.

3.3 Maintenance of Lots and Four Plexes.

A. The Association shall maintain the following:

1. The following portions of the exterior of each Four Plex: siding, structural portions of the Four Plexes, street lamps mounted on the Four Plexes, and all other exterior surface areas, including the entry way, exterior stairs, railings and decks, and roofs.
2. All Sidewalks on the Property.
3. All landscaping on the Property, including, without limitation, all grass areas, shrubs, trees and bushes that are on Residential Lots and the Recreational Center Lot, and all planters, whether they are on Residential Lots or in the Common Area.
4. Drainage Facilities, including the Drainage Lot.
5. The Common Areas.
6. Any perimeter fence.
7. The main lines, service lines, valves, and sprinkler heads of the PUIS on the Property to the extent that they are not maintained by the Nampa Meridian Irrigation District.

B. The Owner shall maintain the following:

1. The following portions of the exterior of each Four Plex: windows, doors, exterior air conditioning units and all other exterior maintenance not performed by the Association; and
2. The entire interior of the Four Plexes, including but not limited to flooring, ceilings, walls and wall coverings, appliances, plumbing and plumbing fixtures, electrical system and fixtures, all interior components of the heating and air conditioning system.

C. Cost of Maintenance:

1. The cost of all maintenance performed by the Association shall be included as part of the Owner's Regular Assessments, as provided at Sections 7.2 and 7.3, except to the extent that the cost of any such maintenance materially exceeds the cost for similar maintenance on other Residential Lots and Four Plexes. Such excess cost may be charged to the Owner as a Limited Assessment in the Board's discretion.
2. The cost of all maintenance required to be performed by the Owner shall be paid for by the Owner.

D. Condition of Lots and Four Plexes. Each Residential Lot and Four Plex, and any and all Improvements from time to time located thereon or therein, shall be maintained in good condition and repair.

3.4 Utilities: Each unit of each Four Plex will be separately metered for electricity and gas. Notwithstanding the separate meters and any lease obligation of the Tenants to pay for their utilities, the Owner shall be responsible for all sewer, water, electrical, gas, and real property taxes associated with the Owner's Four Plex. The Association shall pay for trash service associated with the units of the Four Plexes.

3.5 Owner's Right with Respect to Interiors: Each Owner shall have the exclusive right to paint, repair, tile, wash, paper or otherwise maintain, refinish and decorate the interior portions of their Four Plex, except that Owners shall obtain the consent of the Association with regard to window treatments which are visible from the exterior of the Four Plex, the color, texture and materials of which shall correspond with the general color and architectural scheme of the Property.

3.6 Easements for Access for Repair, Maintenance: The Association is hereby granted an irrevocable easement for purposes of access to and upon each Residential Lot and Four Plex, during reasonable hours and as necessary for the maintenance and repair of the Residential Lot and Four Plex located thereon.

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY PORTION OF SAGECREST SUBDIVISION - 6

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3.7 Restriction on Exterior Construction: No building, fence, wall, or other structure, or any landscaping or other Improvement shall be commenced, erected, altered, or maintained upon the Property, nor shall any exterior additions thereto or change or alteration therein be made until and without the express prior written consent of the Board of Directors, which consent can be withheld for any reason. This Article shall not affect or in any way be applicable to the Declarant, insofar as the Declarant's full development and construction of the Property is concerned.

3.8 Failure of Owner to Maintain such Owner's Residential Lot or Four Plex: In the event the Owner of any Residential Lot improved with a Four Plex shall fail to maintain any portion of such Owner's Residential Lot that *Owner is responsible to maintain*, in a manner reasonable satisfactory to the Board, after approval by vote of at least sixty percent (60%) of the members of the Board present and voting and subject to such Owner's right to notice and a hearing before the Board, the Association may, through its agents and employees, enter upon the Residential Lot or Four Plex and repair, maintain and restore the Residential Lot, or the Four Plex. The cost of such repair, maintenance and restoration shall be chargeable to the Owner of such Residential Lot or Four Plex and shall constitute a lien on the Residential Lot of such Owner, collectible in the same manner as Limited Assessments under this Declaration.

3.9 Exemption for Declarant: The activities of Declarant in the development, construction, ownership, sale and leasing of any Residential Lots, Four Plexes, or other portions of the Property or Improvements erected upon any such portion of the Property shall not be deemed to violate any provision of this Article III.

ARTICLE IV RESOLUTION SUBDIVISION RESTRICTIONS

4.1 Resolution Business Park POA Agreement: By acceptance of a deed to any Residential Lot in the Property each owner of such Residential Lot hereby acknowledges that the Property is subject to the Master Declaration and that the Declarant has sought an agreement with the Resolution Business Park, LLC seeking its approval that the following provisions would apply to the Multi Family Portion of Sagecrest Subdivision, **BUT THAT NO SUCH AGREEMENT HAS YET BEEN REACHED AND DECLARANT MAKES NO REPRESENTATION THAT SUCH AN AGREEMENT WILL BE REACHED:**

- A. The Association is a Sub-Association as that term is defined and used in the Master Declaration. There will be one or more property owner associations for the Commercial Sections of Sagecrest Subdivision, which association(s) will also be a Sub-Association, as that term is defined in the Master Declaration.
- B. Except as provided in Section 4.2, the Residential Lots will not be subject to the Resolution Business Park POA Assessments.
- C. Irrigation water will be provided to the Residential Lots by the pressurized irrigation system (PUIS) developed by the Resolution Business Park, LLC, and owned by Nampa Meridian Irrigation District. In addition to the Assessment

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D. The Declarant has submitted a complete set of construction plans, including a site plan with setbacks, elevations, landscape plan, drainage plan (collectively the **"Construction Plans"**) for three models of Four Plexes. Resolution Business Park, LLC, on behalf of the Architectural Control Committee under the Master Declaration has approved the Construction Plans. Only three Four Plex models and the planned improvements to the Recreation Center Lot are approved, and the approval requirements set forth in the Master Declaration are considered to be met with respect to these Construction Plans.

ARTICLE V
CERTAIN RESTRICTIONS APPLICABLE TO
RESIDENTIAL LOTS AND FOUR PLEXS

B. After the termination of the Declarant Control Period, no signs, including signs for rent or for sale, shall be placed on any Residential Lot or on any Four Plex. Rather, the Board may provide an area within the Recreational Center for posting of advertisements, advertising Four Plexes for sale, and/or units within the Four Plexes for rent.

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C. At both the Overland Rd. and Millennium Way entrance to Sagecrest Subdivision, the Declarant shall install a monumental sign identifying the "Sagecrest Apartments" and directing interested Tenants, or potential purchasers, to the "for sale" and "for rent" information contained in the Recreational Center.

D. Subject to rules and limitations established by the Declarant or by the Board, small address plates identifying the address of units in the Four Plexes.

5.3 Temporary Structures, Vehicles, Etc.:

A. No building of a temporary character or trailer, tent, or out-buildings shall be placed upon the Property or used on or in connection with any Residential Lot or any Four Plex at any time, either temporarily or permanently; and

B. No trailer, motor home, truck (other than a ½ ton pickup truck), camper, boat or similar vehicle or equipment shall be permitted to be kept or parked upon the Property.

5.4 Antennas: No towers, antennas, aerials, or other facilities for the reception or transmission of radio or television broadcasts or other means of communication shall be erected and maintained or permitted to be erected and maintained on the Property.

5.5 Fences. Excepting the perimeter fence installed by the Declarant, no other fences shall be erected and maintained, or permitted to be maintained on the Property.

5.6 Mailboxes: Declarant will construct mailbox clusters in number and location as acceptable to the U.S. Postal Service, which clusters will provide a locked mailbox for each unit of each Four Plex. No other mailboxes shall be permitted.

5.7 Trash: The Owner shall be responsible for insuring that the Owner's Residential Lot is free from garbage and other debris, except landscape materials. The Association shall provide designated areas for the Owner and their Tenants to drop off trash for trash pick up service.

5.8 Animals and Pets: Each Owner shall conform with rules and regulations respecting dogs, cats and other pets and animals, as established from time to time by the Board.

5.9 Laws and Ordinances: Each Owner shall promptly comply with all laws, statutes, ordinances, rules and regulations of Federal, State, or municipal governments or authorities applicable to use, occupancy, construction and maintenance of such Owner's Residential Lot and Four Plex.

5.10 Leases by Owners: Each Owner shall have the right to lease units in their Four Plex. However, any such lease shall conform with the rules and regulation as established from time to time by the Board.

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5.11 Parking and Auto Repair. No automobiles or other vehicles shall be parked in any street or upon any portion of the Property except within the stripped parking areas, or carport, if any, designated as such by the Board. No Tenants or Owner shall park at any one time more than two vehicles anywhere on the Property, including in the designated parking areas. No work on automobiles or other vehicle repair shall be performed in any visible or exposed portion of the Property except in emergencies.

5.12 Abandoned, Inoperable or Oversized Vehicles: Abandoned or inoperable automobiles or vehicles of any kind, except as provided below in this Section 5.9, shall not be stored or parked on any portion of the Property. A written notice describing the "abandoned or inoperable vehicle" and requesting its removal may be personally served upon the owner of such vehicle or posted on the vehicle. If such vehicle has not been removed within thirty-six (36) hours after such notice, or other reasonable notice has been given, the Association shall have the right to remove the vehicle without liability, and the expense of removal and storage shall be charged against the owner of the vehicle.

5.13 Noxious Activities: No noxious or offensive activity shall be carried on upon any Residential Lot or Four Plex nor shall anything be done or placed thereon which may be or become a nuisance, or cause unreasonable embarrassment, disturbance or annoyance either to any other Owner or Tenant in their enjoyment of their Residential Lot or Four Plex unit, the Common Area, or the Sidewalks.

5.14 Nuisances. No rubbish or debris of any kind shall be placed or permitted to accumulate anywhere upon the Property and no odor shall be permitted to arise therefrom so as to render the Property or any portion thereof unsanitary, unsightly, offensive or detrimental to the Property or to the Owners or Tenants. No noise or other nuisance shall be permitted to exist or operate upon any portion of the Property so as to be offensive or detrimental to the Property or to the Owners' Tenants. Without limiting the generality of any of the foregoing provisions, no exterior speakers, horns, whistles, bells or other sound devices (other than security devices used exclusively for security purposes), flashing lights or search lights, shall be located, used or placed on the Property without the prior written approval of Declarant during the period of Declarant Control, or, thereafter, of the Board.

5.15 Limitations on Application of Restrictions: The restrictions set forth in this Article V shall not apply to Declarant, or Declarant's designated successors and assigns until the expiration of the Period of Declarant Control.

5.16 Declarant's Exception: Notwithstanding anything to the contrary contained in this Declaration, Declarant shall have the fullest latitude to develop the Property and to sell the Residential Lots improved with Four Plexes or to lease units therein without reservation, except as imposed by applicable zoning, subdivision, and other land use laws. Declarant may make such use of the unsold or unleased Four Plexes and Residential Lots as may facilitate the construction, improvement, sale and leasing of the Property, including, but not limited to, the maintenance of a sales and rental office, the showing of portions of the Property, and the display of signs. Declarant shall have an easement over the Property for ingress, egress and parking for

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itself, its agents, employees and prospective buyers of Residential Lots improved with Four Plexes.

ARTICLE VI SAGECREST MULTI FAMILY SUBDIVISION PROPERTY OWNERS' ASSOCIATION

6.1 Organization: The Sagecrest Multi Family Property Owners' Association ("Association") shall be initially organized by Declarant as an Idaho, non-profit corporation. The Association is charged with the duties and vested with the powers prescribed by law and set forth in the Articles, Bylaws, and this Declaration. Neither the Articles nor Bylaws shall, for any reason, be amended or otherwise changed so as to be inconsistent with this Declaration. In the event that there should exist any ambiguity in any provision of the Articles or Bylaws, then such provision shall be construed, to the extent possible, so that such provision shall be interpreted so as to be consistent with the provisions of this Declaration.

6.2 Membership: Every person or entity who is a record Owner of a fee or undivided fee interest in any Residential Lot shall be a Member of the Association. Membership shall be appurtenant to and may not be separated from the fee Ownership of any Residential Lot. Ownership of such Residential Lot shall be the sole qualification for membership. Transfer of a Residential Lot shall automatically transfer membership in the Association.

6.3 Association Control: Until the termination of the Declarant Control Period, the Declarant, or the Declarant's successor or assignee, shall have the exclusive control of the Association and the Owners, excluding the Declarant, shall not have the right to vote on any matters involving the operation of the Association or the Association's exercise of its authority. On an after the termination of the Declarant Control Period, the membership shall be franchised and each Member shall be entitled to one vote for each Lot owned.

6.4 Voting Rights: The Association shall have one (1) class of voting members, which shall consist of all Owners, who shall be entitled to one (1) vote for each Residential Lot owned, subject to the restriction contained in section 6.3. When more than one person or entity holds an interest in any Residential Lot, all such persons, or the entity as the case may be, shall be entitled to all rights and privileges of membership. The vote for such Residential Lot shall be exercised as its Owners collectively determine, but in no event shall more than one (1) vote be cast with respect to any Residential Lot.

6.5 No Fractional Votes, Severance of Voting Rights: Fractional votes shall not be allowed. In the event that joint Owners are unable to agree among themselves as to how their vote or votes shall be cast, such Owners shall lose their right to vote on the matter being put to a vote. When an Owner casts a vote, it will thereafter be presumed conclusively for all purposes that such Owner was acting with authority and consent of all joint Owners of the Residential Lot(s) from which the vote derived. The right to vote may not be severed or separated from the Ownership of the Residential Lot to which it is appurtenant, except that any Owner may give a revocable proxy, or may assign such Owner's right to vote to a property manager or Tenant of the Four Plex concerned, for the term of the lease or the term of the management contract. Any

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sale, transfer or conveyance of such Residential Lot to a new Owner shall operate automatically to transfer the appurtenant voting right to the Owner.

6.6 Board of Directors and Officers: The affairs of the Association shall be conducted and managed by the Board of Directors (Board) and such officers as the Board may elect or appoint, in accordance with the Articles and Bylaws, as the same may be amended from time to time. The Board of the Association shall be elected in accordance with the provisions set forth in the Association Bylaws.

6.7 Powers and Duties of Association.

A. Powers. The Association shall have all the powers of a corporation organized under the non-profit corporation laws of the State of Idaho, subject only to such limitations upon the exercise of such powers as are expressly set forth in the Articles, the Bylaws, and Declaration. The Association shall have the power to do any and all lawful things which may be authorized, required or permitted to be done by the Association under Idaho law and under this Declaration, and the Articles and Bylaws, and to do and perform any and all acts which may be necessary to, proper for, or incidental to the proper management and operation of the Association's affairs and the performance of the other responsibilities herein assigned, including, without limitation:

1. Assessments. The power to levy Assessments on any Owner or any portion of the Property and to force payment of such Assessments, all in accordance with the provisions of this Declaration.
2. Right of Enforcement. The power and authority from time to time in its own name, on its own behalf, or on behalf of any Owner who consents thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of this Declaration or the Articles or the Bylaws, including the Association Rules adopted pursuant to this Declaration, and to enforce by injunction or otherwise, all provisions hereof.
3. Delegation of Powers: The authority to delegate its powers and duties to any person, firm or corporation, specifically including a property management company and/or a home owners' association management company. Neither the Association nor the members of its Board shall be liable for any omission or improper exercise by any person or entity of any such duty or power so delegated.
4. Association Rules: The power to adopt, amend and repeal by majority vote of the Board such rules and regulations as the Association deems reasonable. Provided, however, that any Association Rules shall apply equally to all Owners and Tenants and shall not be inconsistent with this Declaration, the Articles or Bylaws. A copy of the Association Rules as

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they may from time to time be adopted, amended or repealed, shall be mailed or otherwise delivered to each Owner. It shall be the responsibility of the Owner to distribute a copy of the Association Rules to each of the Owners' Tenants, if any. Upon such mailing or delivery, the Association Rules shall have the same force and effect as if they were set forth in and were a part of this Declaration. The Association shall post a copy of the Association Rules in a conspicuous place in the recreation center. In the event of any conflict between such Association Rules and any provisions of this Declaration, or the Articles or Bylaws, the provisions of the Association Rules shall be deemed to be superseded by the provisions of this Declaration, the Articles or the Bylaws to the extent of any such inconsistency. During the period of Declarant Control, all rules must be approved by Declarant in order to become effective.

5. Duties: In addition to duties necessary and proper to carry out the powers delegated to the Association by this Declaration, and the Articles and Bylaws, without limiting the generality thereof, the Association or its agent, if any, shall have the authority and the obligation to conduct all business affairs of the Association and to perform, without limitation, each of the following duties:
- (a) Insurance. Obtain insurance from reputable insurance companies authorized to do business in the State of Idaho, and maintain in effect any insurance policy the Board deems necessary or advisable.
 - (b) Rule Making. Make, establish, promulgate, amend and repeal such Association Rules as the Board shall deem advisable.
 - (c) Enforcement of Restrictions and Rules. Perform such other acts, whether or not expressly authorized by this Declaration, as may be reasonably advisable or necessary to enforce any of the provisions of the Declaration, or of the Articles or Bylaws, including, without limitation, the recordation of any claim of lien with the Ada County Recorder, as more fully provided herein.
 - (d) Duty to Accept Property Transferred by Declarant. The Association shall accept title to any property, including without limitation, any improvements thereon, any easement or other right, and personal property transferred to the Association by the Declarant or by any third party with Declarant's permission, and equipment related thereto, together with the responsibility to perform any and all Association functions associated therewith, provided that such property and functions are not inconsistent with the terms of this Declaration. Without limiting the foregoing, it is contemplated that the Declarant shall transfer to

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the Association by good and sufficient deed Residential Lot 64, Block 1, that portion of Lot 60, Block 1 that is contiguous to the Residential Lots, and the Drainage Lot, together with any Improvements thereon.

- (e) Safety and Security. Each Owner and occupant and Tenants of a Four Plex unit, and their respective guests and invitees, shall be responsible for their own personal safety and the security of their property in the Village. The Association may, but shall not be obligated to, maintain or support certain activities within the Property designed to enhance the level of safety or security which each person provides for himself and his property. Neither the Association nor Declarant shall in any way be considered insurers or guarantors of safety or security within the Property, nor shall either be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.

6.8 Personal Liability: No Member of the Board, or member of any committee of the Association, or any officer of the Association, or the Declarant, shall be personally liable to any Owner or Tenants, or to any other party, including the Association, for any damage, loss, or prejudice suffered or claimed on the account of any act, omission, error or negligence of the Association, other committee, or any officer of the Association, or the Grantor, provided that such person, upon the basis of such information as may be possessed by such person, has acted in good faith without willful or intentional misconduct.

ARTICLE VII ASSESSMENTS

7.1 Covenant to Pay Assessments: By acceptance of a deed to any Residential Lot in the Property each Owner of such Residential Lot hereby covenants and agrees to pay when due all Assessments or charges made by the Association, including all Regular, Special and Limited Assessments and charges made against such Owner pursuant to the provisions of this Declaration or other applicable instrument. IN ADDITION, as provided as Section 4.2, any Owner of a Residential Lot within Resolution Subdivision hereby covenants and agrees to pay when due the Owner's pro rata share of all assessments or charges made by the Resolution Business Park POA either against the Association or against such Owner pursuant to the Master Declaration.

- A. Assessment Constitutes Lien. Such Assessments and charges, together with interest at a rate established by the Board, costs and reasonable attorneys' fees which may be incurred in collecting the same, shall be a charge on the land and shall be a continuing lien upon the Residential Lot against which each such Assessment or charge is made.
- B. Assessment is Personal Obligation. Each such Assessment, together with interest at a rate established by the Board, costs and reasonable attorney's fees, shall also

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be the personal obligation of the Owner of such Residential Lot beginning with the time the Assessment falls due. The personal obligation for delinquent Assessments shall remain such Owner's personal obligation regardless of whether he remains an Owner.

7.2 Uniformity of Assessments: Regular Assessments, including the Association's expenses of Four Plex and Residential lot maintenance and repair, shall be uniform as to all Owners; except that, in the discretion of the Board, if maintenance or repair costs for any specific Residential Lot or Four Plex are materially in excess of the cost for similar repair or maintenance on the other Residential Lots and Four Plexes in the Property, the Board may assess such excess cost as a Limited Assessment against such Owner.

7.3 Regular Assessments: The regular assessments may include, and shall be limited to, the following regular expenses:

- A. The Association's repairs and maintenance of Residential Lots and Four Plexes expenses, as described at Article III;
- B. Any assessments made by the Nampa Meridian Irrigation District in connection with irrigation water, and operation and maintenance expenses relating to the irrigation of the Property, as generally described at Section 4.1 above;
- C. Expenses of the management of the Association and its activities;
- D. Taxes and special assessments upon the Association's real and personal property;
- E. Premiums for all insurance which the Association is required or permitted to maintain;
- F. Common services to Owners as approved by the Board;
- G. Legal and accounting fees for the Association;
- H. Expenses related to the maintenance and operation of the Common Areas, including maintenance and operation of the Recreation Center Lot with its related facilities, maintenance of the portion of Lot 60, Block 1 that is contiguous to the Residential Lots; Sidewalk maintenance and repairs; and maintenance of the Drainage Facilities, including the Drainage Lot.
- I. Any deficit remaining from any previous assessment year; and
- J. The creation of reasonable contingency reserves for future repairs and maintenance or improvements, administration expenses, or legal expenses.

Regular assessments shall be paid monthly, or as otherwise determined by the Board, as provided in Section 7.6.

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7.4 Declarant's Obligations: Prior to the expiration of the Declarant Control Period, the Declarant shall (only for Association Assessments, not Resolution Business Park POA Assessments) be deemed to have met its obligation regarding assessments by the contribution of such funds and/or services to the Association as are necessary to permit the Association to perform its responsibilities and meet its financial needs. After the expiration of the Declarant Control Period, Declarant shall be subject to the Association's assessment on any Residential Lots owned by Declarant and located within the Property. The obligations to pay Resolution Business Park POA Assessments, including Declarant's obligation, is described at Section 4.2 above.

7.5 Maximum Regular Assessments:

- A. The Board may pro rate the assessment for any Owner in the year of purchase of such Residential Lot on the basis of the actual months of ownership of such Residential Lot by the Owner during such year.
- B. Effective 2004, and for each subsequent year thereafter during the Declarant Control Period, assessments shall be set by the Declarant, as necessary to meet the Association's financial needs and pursuant to the terms and restrictions of this Article.
- C. Effective upon the expiration of the Declarant Control Period, the annual regular assessment may be increased by the Board by a sum not to exceed twenty percent (20%) of the prior year's regular assessment. Any increase in the regular assessment which exceeds twenty percent (20%) of the prior year's regular assessment shall require the approval of sixty-seven percent (67%) of those members present at or represented by proper proxy at a meeting of the membership conducted pursuant to notice and at which a quorum is present. Notice of such meeting shall set forth the purpose therefore and shall be sent to all members not less than thirty (30) days nor more than sixty (60) days in advance of such meeting.

7.6 Regular Assessment Procedure:

- A. After the Declarant Control Period, the Board shall set the total annual regular assessment based upon an advanced budget of the Association's requirements for the following assessment year. A summary of that budget shall be mailed by ordinary first class mail or otherwise delivered to all Owners by no later than December 1 of the current budget year (i.e. to take effect on January 1 of the next assessment year). Subject to the voting requirements of any increase in the annual regular assessment which exceeds twenty percent (20%) of the prior year's regular assessment, the budget shall take effect on January 1 of the assessment year to which it applies.

- B. The Board shall cause to be prepared, delivered, or mailed to each Owner, at least thirty (30) days in advance of the date payment is due, a payment statement setting forth the annual regular assessment. All payments of regular assessments shall be due and payable without any notice or demand, on the due dates declared by the Board. Regular assessments are to be paid in monthly installments, or other appropriate interval, as determined by the Board. Regular assessments shall be applicable to all Residential Lots, provided that the Declarant's liability shall be as provided in Section 7.4 above. Each Owner other than the Declarant shall become responsible for the regular assessment on a Residential Lot as of the date the Residential Lot is transferred to such owner. The first annual regular assessment for each Owner shall be adjusted according to the number of months remaining in the year.

7.7 Special Assessments:

(a) In the event that the Board shall determine that its Regular Assessments for a given calendar year is or will be inadequate to meet the expenses of the Association for any reason, including, but not limited to capital improvements, attorneys' fees and/or litigation costs, other professional fees, or for any other reason, the Board shall determine the amount necessary to defray such expenses and levy a Special Assessment which shall be computed in the same manner as Regular Assessments. After the Declarant Control Period, no Special Assessment shall be levied without the vote or written consent of a majority of the votes of the members of the Association, which are present at a properly scheduled meeting of the members or represented by proxy. The Board shall, in its discretion, determine the schedule under which such Special Assessment will be paid. Every Special Assessment levied by and for the Association shall be levied and paid upon the same basis as that prescribed for the levying and payment of Regular Assessments for the Association.

(b) There shall be an initial special assessment upon the closing of the first sale of each Lot from the Declarant. At such closing the purchaser thereof shall pay the sum of \$10,000 to the Association to fund the Association's purchase of the Recreational Center Lot.

7.8 Limited Assessments: Notwithstanding the above provisions with respect to regular and special assessments, the Board may levy a limited assessment against an Owner as a remedy to reimburse the Association for costs incurred in bringing the Owner and/or such Owner's Residential Lot into compliance with the provisions of the Association Documents.

7.9 Uniform Rate of Assessment: Unless otherwise specifically provided herein, regular and special assessments shall be fixed at a uniform rate per Residential Lot for all members of the Association.

7.10 Assessment Period. Unless otherwise provided in the Articles or Bylaws, the Assessment period shall commence on January 1 of each year and terminate December 31 of the year.

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7.12 Enforcement of Assessments. Each Owner is and shall be deemed to covenant and agree to pay to the Association each and every assessment provided for in this Declaration; and agrees to the enforcement of all such assessments in the manner herein specified. In the event an attorney or attorneys are employed for collection of any assessment, whether by suit or otherwise, or to enforce compliance with or specific performance of the terms and conditions of this Declaration, each Owner agrees to pay reasonable attorneys fees and costs thereby incurred in addition to any other remedies herein or by law provided, the Board, or its authorized representative, may enforce the obligations of the Owners to pay the assessments provided for in this Declaration, and each of them, in any manner provided by law in equity, or without any limitation of the foregoing, by either or both of the following procedures:

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acknowledged by any officer of the Association and shall contain substantially the following:

1. The claim of lien made pursuant to this Declaration;
2. The name of the record Owner;
3. The legal description of the Residential Lot against which claim of lien is made;
4. The total amount claimed to be due and owing for the amount of the delinquency, interest thereon, collection costs, and attorneys' fees (with any proper offset allowed); and
5. The name and address of the trustee authorized by the Association to enforce the lien by public sale.

Upon recordation, the lien claimed therein shall immediately attach and become effective in favor of the Association as a lien upon the Residential Lot against which such assessment was levied. Such lien shall have priority over all liens or claims created subsequent to the recordation of the Notice. Any such lien may be foreclosed by appropriate action in Court or in the manner provided by the Idaho Code for the foreclosure of a deed of trust with power of sale, or in any other manner permitted by law. The Board is hereby authorized to appoint its attorney, any officer or director of the Association, or any Title Company authorized to do business in Idaho as Trustee for the purpose of conducting such power of sale foreclosure. The lien provided for herein shall be in favor of the Association and shall be for the benefit of all other Residential Lot Owners and payable in accordance with this Declaration after the date of recordation of said Notice. The Association shall have the power to bid in at any foreclosure sale and to purchase, acquire, hold, lease, mortgage and convey any Residential Lot.

Each Owner hereby expressly waives any objection to the enforcement and foreclosure of assessment liens in this manner. Upon the timely curing of any default for which a Notice was filed by the Board, the Board shall cause an officer of the Association to file and record an appropriate release of such Notice in the Office of the County Recorder of Ada County, Idaho. No Owner may waive or otherwise escape liability for the assessments provided for in this Declaration by non-use or abandonment of his Residential Lot.

ARTICLE VIII COMMON AREAS AND SIDEWALKS

8.1. Members' Easements of Enjoyment: Subject to the provisions of Section 10.4 herein, every Owner and their Tenants, including Declarant as to his unsold Residential Lots, shall have a right and easement of enjoyment in and to the Common Areas, and Sidewalks, and such easement shall be appurtenant to and pass with the title to every Residential Lot.

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY PORTION OF SAGECREST SUBDIVISION - 19

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8.2 Transfer of the Title of the Common Area to the Association: The Declarant hereby covenants for itself, its successors and assigns, that, no later than one (1) year following the recordation of this Declaration with the Office of Recorder of Ada County, or at the conclusion of the period of Declarant Control, whichever occurs later, it shall convey fee simple title to the Common Areas; excepting, however, the Recreational Center Lot, which shall be purchased by the Association, free and clear of any and all encumbrances and liens, except current real property taxes, which shall be prorated to the date of transfer, reservations, easements, covenants, conditions and restrictions then of record, including those set forth in this Declaration, to the Association, together with improvements thereon and appurtenances thereto.

8.3 Reservation of Limited Easements: The Declarant, on behalf of itself, its agents, employees, contractors, subcontractors, invitees, successors, assigns and other authorized personnel, and on behalf of the Association, reserves unto itself, in perpetuity, a non-exclusive easement in, over, upon and through the Property for driveway and parking purposes, for drainage and encroachment purposes, and for ingress to and egress from the Common Areas for the purpose of completing improvements thereon or for the performance of necessary repair and maintenance work, and for ingress and egress to Declarant's adjacent properties.

8.4 Owners' Easement of Enjoyment: Every Owner of a Residential Lot shall have an easement and equitable rights of use and enjoyment in and to and throughout the Common Areas as well as a non-exclusive easement and equitable right for ingress, egress and support over and through the Common Areas and Sidewalks. Each such easement and right shall be appurtenants to and pass with the title of every Residential Lot subject to the following restrictions:

- A. The right of the Association, in accordance with provisions of the Articles, Bylaws and this Declaration, to borrow money for the purpose of improving the Common Areas, and in aid thereof, to mortgage said properties; provided, however, that in the event of a default upon any such mortgage, the lender's rights hereunder shall be subordinate to the rights of the Members;
- B. The right of the Association to take such steps as are reasonably necessary to protect the above described properties against foreclosure;
- C. The right of the Association, in accordance with its Bylaws and the provisions of this Declaration to temporarily suspend an Owner's rights as a Member of the Association, following notice and hearing, for any period during which any assessment remains unpaid and for a reasonable period for any infraction of its published Rules and Regulations. Notwithstanding the foregoing, the Association shall have no right to interfere with an Owner's right of ingress to or egress from his Residential Lot;
- D. The right of the Association to charge reasonable admission, use and other fees, and to promulgate reasonable rules and regulations for the use of the Common Areas;

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
PORTION OF SAGECREST SUBDIVISION - 20**

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- E. The right of the Association to establish and amend rules with regard to the use, maintenance and repair of the Common Areas and Sidewalks;
- F. The right of the Declarant, and upon the expiration of the Declarant Control Period the right of the Association, to designate guest parking areas in the Driveway and Parking Lot;
- G. The right of the Association to landscape the Residential Lots and the Recreation Center Lot.

8.5 No Dedication to the Public: Nothing in this Declaration or the other Subdivision Documents will be construed as a dedication to public use, or a grant to any public municipal or quasi-municipal authority or utility, or an assumption of responsibility for the maintenance of any Common Area by such authority or utility, absent an express written agreement to that effect.

8.6 Association's Responsibility for Common Area: The Association, subject to the rights and obligations of the Owners set forth in this Declaration, shall be responsible for the management and control of the Common Area, all landscaped areas, and Sidewalks, and all Improvements thereon (including furnishings and equipment related thereto), and will keep such properties in good, clean, and attractive condition and repair consistent with the standards of the Property.

8.7 Partition not Permitted: The Owner's undivided rights to use and enjoy the Common Area and Sidewalks, which is herein established and is appurtenant to the respective Residential Lots cannot be changed and shall not be separated or separately conveyed. Each undivided interest shall be deemed to be conveyed or encumbered with its respective Residential Lot, even though the description in the instrument of conveyance or encumbrance may refer only to the fee title to the Residential Lot.

ARTICLE IX RESERVED EASEMENTS

9.1 Utility Easements: There is hereby created a general easement upon, across, over, in, and under the Property for ingress and egress and for installation, replacement, repair, and maintenance of all utilities, including but not limited to water, sewer, gas, telephone, electrical, television and a master communications system. By the virtue of this easement, it will be expressly permissible and proper for the companies providing electrical, television, telephone and other communication services to install and maintain necessary equipment on the Property and to affix and maintain electrical, television, communications, and telephone wires, circuits, and conduits under the Property. Any utility company using this general easement shall use its best efforts to install and maintain the utilities provided for without disturbing the uses of the Owners or the Association; shall prosecute its installation and maintenance activities as promptly and expeditiously as reasonably possible; and shall restore the surface to its original condition as soon as possible after completion of its work. Should any utility company furnishing a service covered by the general easement request a specific easement by separate recordable document,

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY PORTION OF SAGECREST SUBDIVISION - 21

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either the Declarant or the Association shall have, and are hereby given the right and authority to grant such easement upon, across, over, or under any part or all of the Property without conflicting with the terms of this Declaration. This general easement will in no way affect, avoid, extinguish, or modify any other recorded easement on the Property.

9.2 Reservation of Easements, Exceptions, and Exclusions for Utilities, Infrastructure, and Access: Declarant reserves for itself and its successors and assigns and hereby grants to the Association, acting through the Board of Directors, the concurrent right to establish from time to time, by declaration or otherwise, utility and other easements, permits, or walkways, drainage, recreation areas and parking areas, and to create other reservations, exceptions, and exclusions in the interest of the Owners and the Association.

9.3 Maintenance Easement: An easement is hereby reserved to Declarant for itself and its successors and assigns and granted to the Association, and any member of the Board of Directors or Manager, and their respective officers, agents, employees and assigns, upon, across, over, in and under the Property and a right to make such use of the Property as may be necessary or appropriate to make emergency repairs or to perform the duties and functions which the Association is obligated or permitted to perform, including but not limited to the following: the right to enter upon any Residential Lot and the exterior of any Four Plex for the purpose of performing repairs and maintenance to such Residential Lot or Four Plex, as provided for herein; and the right to enter upon any Residential Lot to perform landscaping services, and to install, repair and maintain the PUIS.

9.4 Drainage Easement: An easement is hereby reserved to Declarant for itself and its successor and assigns and granted to the Association, its officers, agents, employees, successors and assigns to enter upon, across, over, in, and under any portion of the Property for the purpose of changing, correcting, or otherwise modifying the grade or drainage channels of the Property so as to improve the drainage water. Reasonable efforts will be made to use this easement so as not to disturb the uses of the Owners, or the Association, as applicable, to the extent possible; to prosecute such drainage work promptly and expeditiously; and to restore any areas affected by such work to a usable condition as soon as reasonably possible following such work. Declarant, or its officers, agents, employees, successors and assigns must inform and obtain the approval of the Board prior to undertaking such drainage work, which approval will not be unreasonably withheld.

9.5 Declarant Rights Incident to Construction: Declarant, for itself and its successors and assigns, hereby retains a right and easement of ingress and egress over, in, upon, under, and across the Common Areas and the right to store materials thereon and to make such Improvements on the Property or other real property owned by Declarant; provided, however, that no such rights will be exercised by Declarant in such a way as to unreasonably interfere with the occupancy, use, enjoyment or access to a Owner's Residential Lot by that Owner or his Tenants.

9.6 Easements Deemed Created: All conveyances of Residential Lots hereafter made, whether by Declarant or otherwise, will be construed to grant and reserve the easements

contained in this Article, even though no specific reference to such easements or to this Article appears in the instrument for such conveyance.

ARTICLE X INSURANCE AND FIDELITY BONDS

10.1 Authority to Purchase: All insurance policies relating to the Common Areas, Sidewalks, and Drainage Lot, will be purchased by the Board or its duly authorized agent. The Board will not be liable for failure to obtain any coverage required by this Article or for any loss or damage resulting from such failure if such failure is due to the unavailability of such coverage from reputable insurance companies, or if such coverage is unavailable only at demonstrably unreasonable costs. Notwithstanding the foregoing, if the insurance described below is not reasonably available, or if any policy of such insurance is cancelled or not renewed without a replacement policy having been obtained, the Association promptly will cause notice of that fact to be delivered to all Owners.

10.2 General Insurance Provisions: All such insurance coverage obtained by the Board will be governed by the following provisions:

- A. As long as Declarant owns any Residential Lot, Declarant will be protected by all such policies in the same manner as any other Owner. The coverage provided to Declarant under the insurance policies obtained in compliance with this Article will not be deemed to protect or be for or be for the benefit of any general contractor engaged by Declarant.
- B. The deductible, if any, on any insurance policy purchased by the Board may be treated as an expense payable from Regular Assessments or Special Assessments (allocable to all of the Residential Lots or to only some of the Residential Lots, if the claims for damages arise from the negligence of particular Owners, or if the repairs benefit only particular Owners), or as an item to be paid from working capital reserves established by the Board.

10.3 Physical Damage Insurance on Common Areas: This Association will obtain insurance for all insurable Improvements, if any, on the Common Areas and Drainage Facilities in an amount equal to the full replacement value (i.e. 100% of the current "replacement cost" inclusive of land, foundation, excavation, depreciation on personal property, and other items normally excluded from coverage), which will include all building service equipment and the like, common personal property and supplies, and any fixtures or equipment within the Common Areas. In addition, such policy will afford protection against at least the following:

- A. Loss or damage by fire and other hazards covered by the standard extended coverage endorsement with the standard "all-risk" endorsement covering sprinkler leakage, debris removal, cost of demolition, vandalism, malicious mischief, windstorm and water damage.

- B. Such other risks as will customarily be covered with respect to projects similar in construction, location, and use to this project.
- C. In contracting for the insurance coverage obtained pursuant to this Section, the Board will be required to make reasonable efforts to secure coverage which provides the following:
 - 1. A waiver of any right of the insurer to repair, rebuild or replace any damage or destruction, if a decision is made pursuant to this Declaration not to do so.
 - 2. The following endorsements (or equivalent): (a) "cost of demolition"; (b) "contingent liability from operation of building laws or codes"; (c) "increased cost of construction"; and (d) "agreed amount" or elimination of co-insurance clause.

10.4 Liability Insurance: The Association will obtain a comprehensive policy of public liability insurance and property damage insurance with such limits as the Board may from time to time determine, insuring each member of the Board, the Association, and the respective employees, agents, and all persons acting as agents against any liability to the public or the Owners and Tenants (and their guests, invitees, Tenants, agents, and employees) arising in connection with the Ownership, operation, maintenance, or use of the Common Areas and Sidewalks, and any other areas under the control of the Association. Declarant will be included in the coverage as an additional insured in Declarant's capacity as an Owner or Director. The Owners will be included as additional insureds, but only for claims and liabilities arising in connection with the Ownership, existence, use or management of the Common Areas and Sidewalks.

The Board will review the coverage limits at least once every two years, but, generally, the Board will carry such amounts of insurance usually required by private institutional mortgage lenders on projects similar to the Association's Property.

10.5 Provisions Common to Physical Damage Insurance, Liability Insurance and Fidelity Insurance: Any insurance coverage obtained by the Association under the provisions of this Article above will be subject to the following provisions and limitations:

- A. The named insured under any such policies will include Declarant, until all Residential Lots have been conveyed, and the Association as attorney-in-fact for the Owners, or the authorized representative of the Association, who will have exclusive authority to negotiate losses under such policies.
- B. Each Owner will be an insured person with respect to liability arising out of the Owner's interest in the Common Areas and Sidewalks or membership in the Association.

- C. In no event will the insurance coverage obtained and maintained pursuant to this Article be brought into contribution with insurance purchased by the Owners or their Mortgagees.
- D. ~~The policies will provide that coverage will not be prejudiced by (i) any act or neglect or any Owner or Tenant (and their family, tenants, servants, agents, invitees and guests) when such act or neglect is not within the control of the Association, or (ii) any act or neglect or failure of the Association to comply with any warranty or condition with regard to any portion of the Property over which the Association has no control.~~
- E. The policies will contain a waiver by the insurer of any right to claim by way of subrogation against Declarant, the Board or the Association.
- F. The policies described above will provide that any "no other insurance" clause will expressly exclude individual Owners' policies from its operation so that the physical damage policy or policies purchased by the Board will be deemed primary coverage, and any individual Owners' policies will be deemed excess coverage.

10.6 Personal Liability Insurance of Officers and Directors: To the extent obtainable at reasonable cost, appropriate officers' and directors' personal liability insurance will be obtained by the Association to protect the officers and directors from personal liability in relation to their duties and responsibilities in acting as such officers and directors on behalf of the Association.

10.7 Owners' Responsibility: Insurance coverage for each Owner's Residential Lot and Four Plex, and all improvements and personal property located thereon, and casualty and public liability insurance coverage regarding the activities of the Owner, and the Owner's agents, invitees, or guests, with respect to their Residential Lot and Four Plex and with respect to the Common Area, shall be the responsibility of each respective Owner.

ARTICLE XI DAMAGE OR DESTRUCTION

11.1 Damage of Destruction of Common Areas:

- A. Estimate of Damages or Destruction. As soon as practical after an event causing damage to or destruction of any part of the Common Areas, unless such damage or destruction is minor, the Association will obtain an estimate or estimates that it deems reliable and complete of the costs of repair and reconstruction of that part of the Common Areas so damaged or destroyed. "Repair and reconstruction" as used in this Article will mean restoring the damaged or destroyed Improvements to substantially the same condition in which they existed prior to the damage or destruction.

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
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- C. In no event will the insurance coverage obtained and maintained pursuant to this Article be brought into contribution with insurance purchased by the Owners or their Mortgagees.
- D. The policies will provide that coverage will not be prejudiced by (i) any act or neglect or any Owner or Tenant (and their family, tenants, servants, agents, invitees and guests) when such act or neglect is not within the control of the Association, or (ii) any act or neglect or failure of the Association to comply with any warranty or condition with regard to any portion of the Property over which the Association has no control.
- E. The policies will contain a waiver by the insurer of any right to claim by way of subrogation against Declarant, the Board or the Association.
- F. The policies described above will provide that any "no other insurance" clause will expressly exclude individual Owners' policies from its operation so that the physical damage policy or policies purchased by the Board will be deemed primary coverage, and any individual Owners' policies will be deemed excess coverage.

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**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
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- B. Repair and Reconstruction. As soon as practical after obtaining estimates, the Association will diligently pursue to completion the repair and reconstruction of the damaged or destroyed Improvements. The Association may take any and all necessary or appropriate action to effect repair and reconstruction, and no consent or other action by any Owner will be necessary. Assessments of the Association will not be abated during the period of insurance adjustments and repair and reconstruction.
- C. Funds for Repair and Reconstruction: The proceeds received by the Association from any hazard insurance will be used for the purpose of repair, replacement and reconstruction. If the proceeds of the insurance are insufficient to pay the estimated or actual cost of such repair and reconstruction, the Association may levy, assess and collect in advance from all Owners, a Special Assessment sufficient to provide funds to pay such estimated or actual costs of repair and reconstruction. Further levies may be made in like manner if the amounts collected prove insufficient to complete the repair and reconstruction.
- D. Disbursement of Funds for Repair and Reconstruction: The insurance proceeds held by the Association and the amounts received from Special Assessments constitute a fund for the payment of the costs of repair and reconstruction after casualty. It will be deemed that the first money disbursed in payment for the costs of repair and reconstruction will be made from insurance proceeds, and the balance from the Special Assessments. If there is a balance remaining after payment of all costs of such repair and reconstruction, such balance will be distributed to the Owners in proportion to the contributions each Owner made as a Special Assessment to the Association.
- E. Decision not to Rebuild: If, the Owners representing at least 67% of the votes in the Association agree in writing not to repair and reconstruct damage to the Common Areas and no alternative Improvements are authorized, then and in that event the Property will be restored to its natural state and maintained as an undeveloped portion of the Common Areas by the Association in a neat and attractive condition, and any remaining insurance proceeds will be distributed equally to the Owners.
- 11.2 Damage or Destruction to Four Plex or Residential Lot/Obligation to Repair and Restore:
- A. In the event a Four Plex shall be partially or entirely destroyed by fire or other casualty such Four Plex shall either be repaired and restored within a reasonable period of time in a manner consistent with the applicable Design Guidelines or demolished and the Residential Lot landscaped in accordance with the applicable Design Guidelines so that no damaged portion of the former structure remains visible from any other Residential Lot or Common Area. Subject only to the rights of an institutional holder of a first mortgage lien on a damaged Four Plex the insurance proceeds from any insurance policy covering a damaged or

destroyed Four Plex shall be first applied to such repair, restoration or replacement of such Four Plex or the demolition of such Four Plex and landscaping of such Residential Lot. Each Owner shall be responsible for the repair, restoration, replacement or demolition of repair, restoration or replacement; or demolition of each Four Plex owned by such Owner, pursuant to the terms of this Declaration. Any such repair, restoration or replacement shall (subject to advances and changes in construction techniques and materials generally used in such construction and then current generally accepted design criteria) be consistent with the portion of the Four Plex repaired, unless the Board approves other plans for the repair and reconstruction of the damaged Four Plex.

- B. If the proceeds of the insurance available to the Owner of a damaged Four Plex are insufficient to pay for the cost of repair, restoration or replacement of a Four Plex following a casualty (or demolition and landscaping if the Four Plex is to be demolished), the Owner of such Four Plex shall be responsible for the payment of any such deficiency necessary to complete the repair, restoration, replacement or demolition, as required by this Article.
- C. If the insurance proceeds in excess of the amount necessary for the repair, restoration, or replacement of a Four Plex, the Owner of such Four Plex shall be entitled to such excess in accordance with the provisions of the applicable insurance policy or policies and subject to the terms of any mortgage covering such Four Plex.

ARTICLE XII MISCELLANEOUS

12.1 Term: The easements created hereunder shall be perpetual, subject only to extinguishment by the holders of such easements as provided by law. The covenants, conditions, restrictions, and equitable servitudes of this Declaration shall run until August 1, 2044, unless amended as herein provided. After August 1, 2044, such covenants, conditions and restrictions shall be automatically extended for successive periods of ten (10) years each, unless amended or extinguished by a written instrument executed by Owners holding at least seventy-five percent (75%) of the voting power of the Association and such written instrument is recorded with the Ada County Recorder.

12.2 Amendment:

- A. By Owners. Except where a greater percentage is required by express provision in this Declaration, any amendment to the provisions of this Declaration, other than this Article XIV, shall be by an instrument in writing signed and acknowledged by the president and secretary of the Association certifying and attesting that such amendment has been approved by the vote or written consent of the Owners representing more than seventy-five percent (75%) of the votes in the Association, and such amendment shall be effective upon its recordation with the Ada County Recorder. Any amendment to this Article XIV shall require the

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
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vote or written consent of Members holding ninety-five percent (95%) of the voting power of the Association.

- B. Declarant's Approval. Notwithstanding the provisions of Section 14.2(A), no termination, extension, modification or amendment of this Declaration will be effective during the Period of Declarant Control unless the written approval of Declarant is first obtained.
- C. Validity and Effective Date of Amendments. Amendments to this Declaration shall become effective upon recordation in the land records of Ada County, Idaho, unless a later effective date is specified therein. Any procedural challenge to an amendment must be made within six months of its recordation or such amendment shall be presumed to have been validly adopted. In no event shall a change of conditions or circumstances operate to amend any provisions of this Declaration.

If an Owner consents to any amendment to this Declaration or the Bylaws, it will be conclusively presumed that such Owner has the authority to consent, and no contrary provision in any Mortgage or contract between the Owner and a third party will affect the validity of such amendment. No amendment shall be contrary to the terms or conditions of any valid County, State, or Federal Permit applicable to the Property; nor shall any Amendment divest any Owner of any material and substantial vested property rights.

No amendment may remove, revoke, or modify any right or privilege of the Declarant without the written consent of the Declarant or the assignee of such right or privilege.

12.3 Mortgage Protection. Notwithstanding any other provision of this Declaration, no amendment of this Declaration shall operate to defeat or render invalid the rights of any mortgagee under a mortgage or the beneficiary under any deed of trust upon a Residential Lot made in good faith and for value, and recorded prior to the recordation of such amendment, provided that after foreclosure of any such mortgage or deed of trust such Residential Lot shall remain subject to this Declaration, as amended.

12.4 Notices: Any notices permitted or required to be delivered as provided herein shall be in writing and may be delivered either personally or by mail. If delivery is made by mail, it shall be deemed to have been delivered seventy-two (72) hours after the same has been deposited in the United States mail, postage prepaid, addressed to any person at the address given by such person to the Association for the purpose of service of such notice, or to the residence of such person if no address has been given to the Association. Such address may be changed from time to time by notice in writing to the Association.

12.5 Enforcement and Non-Waiver:


- A. Right of Enforcement. Except as otherwise provided herein, any Owner of any Residential Lot shall have the right to enforce any or all of the provisions hereof against any Residential Lot within the Property and Owners thereof.

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
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IN WITNESS WHEREOFF, the parties have hereunto set their hands and seals this
____ day of _____, 2004

SAGECREST DEVELOPMENT, L.L.C.

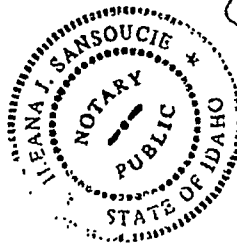
By 
Russell D. Hunemiller, its Member

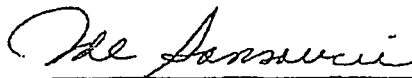
STATE OF IDAHO,)
 : ss.
County of Ada.)

On this 18 day of November, 2003, before me, the undersigned, a Notary Public in and for said State, personally appeared RUSSELL D. HUNEMILLER, known and identified to me to be the Member of SAGECREST DEVELOPMENT, L.L.C. an Idaho Limited Liability Company, that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL)





Ileana Sansoucie
Notary Public for Idaho
Residing at Boise, Idaho
Commission expires: 11/19/2008

EXHIBIT A

LEGAL DESCRIPTION

Lots 10 through 32; Lots 45 through 53 and Lots 60 through 77 in Block 1 of SAGECREST
SUBDIVISION, according to the official plat thereof, filed in Book 90 of Plats at Page(s) 10438
through 10441, official records of Ada County, Idaho.

STATE OF IDAHO, COUNTY OF ADA, ss.

I, J. David Navarro, Recorder for Ada County, do hereby certify that the Attached is a full,
true and correct copy of Inst. No. 104146558
as it appears on record in Book 90 of Plats, County of Ada, State of Idaho.

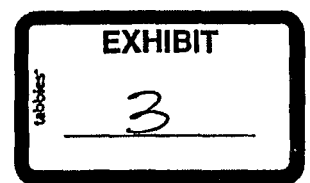
IN WITNESS WHEREOF, I have set my hand and affixed my official seal this
21 day of June, 2007

J. DAVID NAVARRO, Recorder
Deputy

**EXHIBIT A TO THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE
MULTI FAMILY PORTION OF SAGECREST SUBDIVISION - 31**
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Section 6.6 A

Management Agent. The Board of Directors will contract or employ for the Association a management agent ("Manager") at a compensation established by the Board of Directors and Manager to perform such duties and services as the Board of Directors shall authorize, including, but not limited to the duties listed in Section 3.3 and enforcement of section 5 hereof. This management company for now will be H & H Properties L.L.C. with offices located at 520 S. Orchard Suite 101 Boise, Id 83705. This said management company will manage this association as well as all rental units within Sagecrest Property Owners Association, but at any time could be removed from this management with a 75% vote from the current members and also with a sixty (60) day written notice from these same members to this said management company notifying them of this decision. Grandfathered into this agreement as of this recording date is allowing owners that are currently managing their own properties will be allowed to continue the management until the property is sold at which time the new owner of the property would contract with the associations assigned manager. All owners that currently employ another management company would be required to change to the association's manager at the completion of the contract. The Board of Directors reserves the right to buy out the other manager's contract if they feel it is in the best interest of this association.



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POA AGREEMENT

1.0 AGREEMENT

This AGREEMENT, made and entered into this 15th day of March 2010, between First Rate Property Management, Inc, hereafter referred to as "AGENT", and Sagecrest POA hereafter referred to as "ASSOCIATION".

2.0 CONSIDERATION

IN CONSIDERATION of the mutual promises, covenants and conditions herein contained, ASSOCIATION and AGENT hereby agree as follows:

- 2.1. **Appointment:** ASSOCIATION hereby appoints AGENT as the exclusive Managing Agent of the ASSOCIATION with respect to the property commonly known as Sagecrest POA.
- 2.2. **Term of Agreement:** The term of this AGREEMENT shall be for twelve (12) months, commencing on March 15th, 2010.
- 2.3. **Renewal:** Not less than thirty (30) days prior to the ending date of this AGREEMENT, the parties will confirm their intent to renew and make every reasonable attempt to agree to terms and conditions upon which the contract will be renewed.
- 2.4. **Early Termination:** Either party may terminate this AGREEMENT prior to expiration of its term in event the other party shall fail or refuse to perform its material obligations hereunder; provided, however, that except in cases of failure to pay any money due to the other party, or failure to honestly account for and remit money belonging to the ASSOCIATION, the terminating party shall give written notice to termination at least sixty (60) days prior to the effective date of the termination.
- 2.5. **Consequences of Termination:** In event of termination of this AGREEMENT by expiration of its term, or non-renewal, or otherwise, each party shall account to the other for all matters outstanding as of the effective date of termination. AGENT shall, no later than the effective date of termination, return to ASSOCIATION all of ASSOCIATION's books and records in AGENT's possession at the time of termination, but AGENT shall be entitled to make and retain copies thereof to the extent reasonable required for AGENT'S tax, accounting, and legal purposes.

3.0 DUTIES OF AGENT

- 3.1 Receive maintenance requests and complaints relating to the property, and in a timely and efficient manner, inform the appropriate contractors (which shall be selected by ASSOCIATION) or ASSOCIATION employees or Board of Directors of the necessity of corrective action.
- 3.2 Assist the ASSOCIATION in enforcement of its rules and regulations by preparing and transmitting notifications of violations to owners and tenants as requested by the ASSOCIATION.
- 3.3 Promptly notify the ASSOCIATION in the event any matter comes to the attention of AGENT relating to the condition of the Property or any violation of ASSOCIATION rules and regulations, which requires the attention of the ASSOCIATION.

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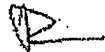


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- 3.4 Take such action as AGENT deems reasonable and appropriate in the event of any emergency brought to AGENT's attention which may result in damage to the Property or cause injury to tenants and occupants of the Property. Notwithstanding this authority, it is understood and agreed that AGENT will if at all possible, confer immediately with the President or other authorized officer of the ASSOCIATION regarding all emergency repairs in excess of \$300.00 without first obtaining approval of the ASSOCIATION.
- 3.5 Provide correspondence and telephone services for all routine business matters involving the management of the Property.
- 3.6 Assist ASSOCIATION with respect to insurance matters and in the placement of insurance, as and when requested by ASSOCIATION. ASSOCIATION shall cause AGENT to be named as an additional insured party upon all policies of liability insurance maintained by ASSOCIATION.
- 3.7 To pay any taxes and improvement assessments as directed by the ASSOCIATION.
- 3.8 Coordinate annual landscaping and seasonal lawn maintenance.
- 3.9 Assist the ASSOCIATION as needed by preparing monthly and other reports as requested to include but not limited to: vacancy, income and expense, budget, and future projects, as needed to keep the board members informed on the status of the complex.
- 3.10 Prepare and mail a statement to each ASSOCIATION owner, on a scheduled basis approved by ASSOCIATION, reflecting amounts due from each such owner for dues, assessments, or other payments due to ASSOCIATION.
- 3.11 Collect and deposit in ASSOCIATION's operating account, all dues, assessments, and other payments due from ASSOCIATION's owners and other sources.
- 3.12 Receive and review all bills for operating expenses incurred by the ASSOCIATION, and draw checks upon the ASSOCIATION's operating account in payment for such expenses. AGENT shall pay no bill without the prior approval of ASSOCIATION except for routine operating expenses reflected in ASSOCIATION's approved budgets. For purposes of implementing the provisions of this subparagraph, ASSOCIATION shall cause AGENT's designated representative or representatives to be added as authorized signatures for withdrawal of funds from ASSOCIATION's operating account. It shall be the responsibility of ASSOCIATION to assure that adequate funds are maintained on deposit in such account for the payment of ASSOCIATION's bills.
- 3.13 Maintain detailed and proper books of account reflecting all receipts and disbursements in accordance with generally accepted accounting principles. Such books and records shall be open to inspection by ASSOCIATION's authorized representative at any time with reasonable notice.
- 3.14 Prepare an itemized statement of cash receipts and disbursements ("cash flow") and submit the same to the ASSOCIATION within twenty (20) days after the close of each calendar month, reflecting all transactions during such calendar month. AGENT shall also include with such monthly statements an appropriate statement reflecting the status of all past due and delinquent owner accounts.
- 3.15 Prepare and mail written notifications to ASSOCIATION owners who are past due in payment of any amounts owing to ASSOCIATION. Such notifications shall be sent at least monthly to each owner who is thirty (30) days or more in arrears in payments.
- 3.16 AGENT will pursue collection of all delinquent accounts on a monthly basis in accordance with policies established by the ASSOCIATION Board of Directors. The ASSOCIATION understands that the AGENT is not a collection agency and that the AGENT cannot practice law by representing them in Small Claims or any other court.
- 3.17 AGENT shall promptly file proper releases of Claims of Lien upon receipt of payment of the delinquent payments by reason of which such liens were filed.
- 3.18 AGENT shall, upon request from any owner or purchaser of a unit in the Property, or such party's mortgage lender, or title insurance company authorized by any of the same, furnish a written statement evidencing the status of payment of dues, assessments, or other charges relating to such owner or purchaser's unit.

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4.0 ADDITIONAL SERVICES BY AGENT:

- 4.1 AGENT shall attend Board Meetings and the Annual Meeting as required of the ASSOCIATION's Board of Directors each year.
- 4.2 AGENT shall furnish a copy of ASSOCIATION by-laws or other documents to new or other owners, as requested by the ASSOCIATION.
- 4.3 AGENT will prepare and mail out the notice and proxies for the annual and any special meetings, as well the meeting minutes of the Association. Costs for copying, envelopes, and postage shall be charged back to the ASSOCIATION at the actual rate paid.
- 4.4 A representative of the AGENT will attend local annual meetings of the ASSOCIATION and local meetings of the ASSOCIATION Board of Directors to provide information, answer questions, give advice, and obtain instructions.
- 4.5 AGENT will provide clerical and secretarial support as required to accomplish all services listed herein.

5.0 DUTIES OF ASSOCIATION

- 5.1 Resident managers and/or on-site managers who work on the business and affairs of the ASSOCIATION shall be employees of Agent. However, it is understood that the fully burdened costs of the Agent's on-site employees who are fully assigned to the ASSOCIATION's premises and fully dedicated to the ASSOCIATION's business shall be reimbursed by the ASSOCIATION. Presently, on-site staff consists of two part-time employees working thirty hours (30) each per week. Agent agrees to comply with all local, State and Federal laws in employing employees and agrees to hold harmless and defend the ASSOCIATION from any and all claims arising by reason of employment of any employee of AGENT. The ASSOCIATION reserves the right to approve the AGENT's assignment of on-site staff.
- 5.2 ASSOCIATION shall maintain at ASSOCIATION's expense all utility services to include: electricity, gas, water, sewer, trash, telephone, fax, and high speed internet.

6.0 COMPENSATION TO AGENT

- 6.1 ASSOCIATION agrees to pay to AGENT, in advance, on the first day of each calendar month, the sum of \$150.00 as AGENT's monthly management fee.
- 6.2 AGENT shall be responsible for payment of all compensation of AGENT's officers and office employees; however, the following expenses are to be borne by ASSOCIATION and are not included in AGENT's management fees:
 - 6.2.1 Postage, courier and communication service charges incurred in connection with correspondence, including but not limited to conference call charges and any other special billing.
 - 6.2.2 Recording fees in connection with the recording of any Claim of Lien or release thereof.
 - 6.2.3 Photocopying charges, at a rate of \$0.08 per copy.
 - 6.2.4 Expenses for labor and materials incurred in the repair, maintenance, and operation of the Property.
 - 6.2.5 Advertising costs, not to exceed \$500 per month or as otherwise directed in writing by ASSOCIATION.
 - 6.2.6 Resident Manager and/or Onsite Manager insurance, payroll taxes, employee benefits, and base salaries as dictated by the ASSOCIATION. Presently the ASSOCIATION employs two onsite personnel.

7.0 AUTHORITY OF PARTIES

- 7.1 ASSOCIATION hereby grants to AGENT the authority and power to perform such acts and deeds, and to incur such costs and expenses, all on behalf of and as agent for the ASSOCIATION, as shall be reasonable and necessarily required to carry out AGENT's duties and responsibilities hereunder.

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- 7.2 Unless written notice to the contrary is hereafter given by the ASSOCIATION Board of Directors, the President of the ASSOCIATION is hereby designated as the authorized representative of ASSOCIATION to give and receive notices, approvals, and instructions hereunder. In case of the unavailability of the President, in emergency circumstances, AGENT must communicate with any member of ASSOCIATION's Board of Directors and may rely upon approvals and instructions from such members of the Board of Directors.

8.0 WORKER'S COMPENSATION INSURANCE

- 8.1 AGENT shall maintain in force any workers compensation insurance required by law, covering all employees of AGENT who shall at any time be present on the Property.
- 8.2 ASSOCIATION shall maintain in force workers compensation insurance required by law, covering any employees of ASSOCIATION which shall at any time be in or upon the Property. ASSOCIATION shall require all contractors of ASSOCIATION to provide proof of workers compensation insurance, liability insurance and a contractor's license to AGENT prior to ASSOCIATION entering into any contract for services in or upon the Property.

9.0 NOTICES

All notices, requests, demands, instructions, or other communications to be given to any party hereunder shall be in writing. Any such writing shall be deemed to have been given when deposited in the US Postal Service, postage fully prepaid, by registered or certified mail, addressed to the addressee at the last known address of such addressee.

10.0 ENTIRE AGREEMENT

This AGREEMENT contains the entire agreement between the parties hereto, and supersedes all prior negotiations and agreements, whether written or oral. No modifications or amendments hereto shall be of any force or effect unless in writing and executed by both AGENT and ASSOCIATION.

11.0 LEGAL FEES

- 11.1 ASSOCIATION agrees to pay all expenses incurred by AGENT including, without limitation, attorney's fees for counsel employed to represent AGENT or ASSOCIATION in any proceeding or suit involving an alleged violation by the AGENT or ASSOCIATION, or both, of any constitutional provision, statute, ordinance, law or regulation of any governmental body pertaining to fair employment, Federal Fair Housing, including, without limitation, those prohibiting or making illegal discrimination on the basis of race, creed, color, religion, or national origin, marital status, or mental or physical handicap in the sale, rental or other disposition or housing or any services rendered in connection therewith, but nothing herein contained shall require the AGENT to employ counsel to represent the ASSOCIATION or himself in any such proceeding or suit. (Idaho Code, Sections 12-120 and 12-121)
- 11.2 ASSOCIATION shall not hold AGENT liable for any error of judgment or mistake of law except in cases of willful misconduct or gross negligence.
- 11.3 If any legal action or proceeding be brought by either party to enforce any part of this AGREEMENT, the prevailing party shall recover in addition to all other relief, reasonable attorney's fees and costs, but not to exceed \$750 (seven hundred fifty dollars). (Idaho Code, Sections 12-120 and 12-121)

12.0 BINDING EFFECT

- 12.1 The provisions of this AGREEMENT shall inure to the benefit of, and shall be binding upon, the heirs, personal representatives, successors and assigns of all parties hereto. AGENT may assign its rights and duties hereunder only upon the prior written consent of ASSOCIATION.
- 12.2 Should any Section or any part of any Section of this AGREEMENT be rendered void, invalid, or enforceable by any reason by any court of law exercising competent jurisdiction, such a determination shall not render void, invalid, or unenforceable any other Section or any part of any Section in this

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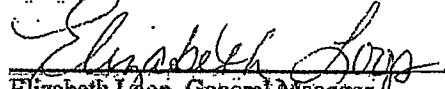
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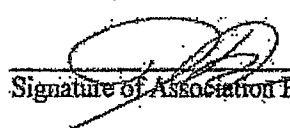
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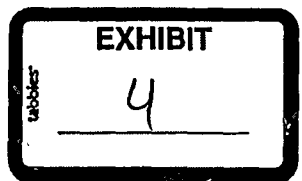
IN WITNESS WHEREOF, the parties hereby have affixed or caused to be affixed their respective signatures this day of March 12th, 2010.

AGENT


Elizabeth Loop, General Manager
First Rate Property Management, Inc.

ASSOCIATION


Signature of Association President Jon Kalsbeck
1805 E. Overland Road
Street Address
Meridian, ID 83642
City, State, & Zip
Cell: 925.228.7000 Work: 925.372.9005
Phone Numbers
SagecrestPOA@yahoo.com
Association Email address
81-0668369
Association Tax ID
Vice-President Jay Arla 208-284-1330
Emergency Contact Name and Phone Number



000103



7150 W. Potomac Dr. • Boise, ID 83704 • (208) 321-1900 • Fax: (208) 321-1901

Check us out on the web at: www.frpmrentals.com

**FIRST RATE PROPERTY MANAGEMENT, Inc.
RENTAL MANAGEMENT AGREEMENT**

1. AGREEMENT

THIS AGREEMENT is made and entered this 15th day of March, 2010, by and between Matthew E. Switzer (hereinafter called "OWNER") and First Rate Property Management, Inc. (hereinafter called "AGENT").

2. APPOINTMENT OF AGENT

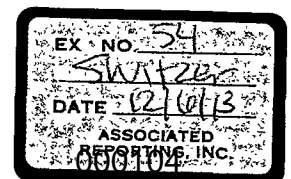
- 2.1 OWNER hereby appoints AGENT as sole and exclusive agent of OWNER to manage the PREMISES described in paragraph 2.2 upon the terms and conditions provided herein. AGENT accepts the appointment and agrees to furnish the services of its organization for the management of the PREMISES.
- 2.2 The property to be managed by AGENT under this AGREEMENT (the "PREMISES") is located at 1805 E. Overland. Bldg. 46 #11, #12, #23 and #24 the city of Meridian in the state of Idaho.
- 2.3 This AGREEMENT is on a month-to-month basis, commencing on the 14th day of March, 2010, and either party may terminate this AGREEMENT upon 30 days written notice delivered to the other party, subject to the provisions of paragraph 18.1 herein.
- 2.4 OWNER warrants that OWNER is the sole owner of the PREMISES, or has unconditional authority to execute this AGREEMENT on behalf of any CO-OWNER and that the PREMISES are not subject to current legal action or foreclosure. Any individual OWNER shall have authority to hereafter take action and enter into further agreements with AGENT on behalf of all CO-OWNERS.
- 2.5 OWNER authorizes AGENT to contract for services to include but not limited to, water, sewer, garbage, gas, electric, irrigation, yard care, maintenance agreements; and coin operated washer and dryers. OWNER to assume the obligation of any contracts entered.

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3. BANKING

AGENT shall utilize its Operating Account for the deposit of receipts and collections as described herein. Funds in the account shall remain the property of the OWNER subject to disbursement of expenses by AGENT as described in this AGREEMENT. AGENT'S Operating Account is a common account used for Owners represented by AGENT.

- 3.1 AGENT shall collect all rents, charges and other amounts receivable on OWNER's account in connection with the management of the PREMISES. Such receipts shall be deposited in the account maintained by the AGENT for the PREMISES. OWNER authorizes AGENT to endorse any and all checks drawn to the order of OWNER for deposit to such operating account.
- 3.2 If OWNER chooses, AGENT can electronically transfer monthly proceeds directly to OWNER'S account. Otherwise all Cash Distributions will be sent via check.
- 3.3 OWNER acknowledges that all interest amounts received by AGENT on any lease income, operating funds, security and other deposits, or any other amounts held in the Operating Account shall be retained by AGENT or as directed by the State of Idaho.
- 3.4 AGENT shall comply with all applicable state or local laws concerning the responsibility for security deposits. Security deposits will be deposited in the account maintained by the AGENT for the PREMISES. AGENT shall collect and maintain all tenant deposits, such as security deposits, cleaning and damage deposits, pet deposits, cable/satellite deposits, and any other deposits in which AGENT deems necessary to collect from TENANT. OWNERS of new accounts agree to provide an accounting of all security deposits and to supply AGENT with matching funds prior to the execution of this AGREEMENT. Should the PREMISES sell or upon termination of this AGREEMENT, OWNER authorizes AGENT to deduct any outstanding fees owed by TENANT to AGENT from the security deposits prior to releasing these funds. (Idaho Code, Section 6-321)
- 3.5 Owner shall be responsible for the payment of all mortgage/notes, property taxes, special assessments, Homeowner Association fees, special assessments, all utilities as listed in paragraph 7.1 of this AGREEMENT, and premiums for casualty and liability insurance relating to the PREMISES unless otherwise modified in writing with AGENT.
- 3.6 Owner shall maintain a minimum balance of \$200 (two hundred dollars) per property at all times.
- 3.7 Upon acceptance of the request to make payments for those items listed in Section 3.5 of this AGREEMENT, AGENT will disperse funds accordingly, provided that OWNER'S account has sufficient funds. OWNER agrees to provide all necessary information and funds to AGENT to ensure proper and timely payments and hold AGENT harmless for any costs or responsibilities due to late payments. If AGENT is to make payments to any of the aforementioned entities, OWNER agrees to notify each entity and to authorize AGENT to call and access account information. OWNER bears sole responsibility for payments, late fees, lost payments, and/or any damages.
- 3.8 From the Operating Account, AGENT is hereby authorized to pay or reimburse itself for all expenses and costs of operating the PREMISES, including AGENT's compensation and expense reimbursements. Owner's funds shall be kept separate from AGENT's funds and operating expenses.

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- 3.9 At the discretion of AGENT, any balance of the OWNERS account due and owing AGENT and not paid within 10 days of constructive notice will accrue interest at Eighteen percent (18%) per annum however not less than Twenty-Five Dollars (\$25) per month, until paid in full. Mailing of monthly statement of income and expenses indicating a deficient OWNER balance shall be sufficient notice to OWNER of balance due. (Idaho Code, Section 28-22-104)
- 3.10 OWNER agrees to keep all mortgages, property taxes, association fees, or any other obligations which could lead to a foreclosure action against the property current and paid in full. Should AGENT be notified that a foreclosure action has been initiated against the PREMISES, OWNER authorizes AGENT to freeze all OWNER related funds to that property and AGENT will not make any further disbursements to OWNER until a reserve balance of \$1,000 (one thousand dollars) is created. OWNER will have 30 days to correct and make all obligations current. Should OWNER fail to stop the foreclosure process, OWNER authorizes AGENT to release the TENANT from their rental agreement and all future rental payments, refund the security deposit to the TENANT, and deduct from OWNER'S funds on hand all amounts due to AGENT or TENANT including, but not limited to, any refund to TENANT of prorated rents or expenses and all management fees and other fees as described within this AGREEMENT.

4. FINANCIAL AND OTHER REPORTS

AGENT shall issue to OWNER itemized statements by the 25th day of each month which will include an accounting of all income and expenses related to the property.

5. LEASING AND RENTING

- 5.1 AGENT shall use all reasonable effort to keep the PREMISES rented by procuring tenants for the PREMISES. AGENT is authorized to negotiate, prepare and execute all leases, including renewals and extensions of leases and to cancel and modify existing leases, utilizing AGENT forms and agreements exclusively.
- 5.2 During the term of this AGREEMENT, OWNER shall not authorize any other person, to negotiate or act as rental agent with respect to any leases for the PREMISES.
- 5.3 Rental amount shall be determined by mutual agreement between the Sagecrest POA and AGENT. OWNER understands that the AGENT recommends rental amounts based on a Comparative Market Analysis of similar properties within the area of the OWNER'S property.
- 5.4 OWNER and AGENT agrees to follow all Federal and Local Fair Housing Laws. If OWNER should at any time request AGENT to disregard Fair Housing laws and/or Landlord/Tenant Laws, this contract will be terminated immediately and the management fees for the balance of this contract or \$500, whichever is greater, will be due immediately. (Idaho Code, Section 18-7303)

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- 5.5 With OWNER approval, AGENT shall have authority on behalf of the OWNER to terminate any lease or rental agreements covering the PREMISES that are in default, to execute and serve such legal or other notices as AGENT deems appropriate, to institute legal actions for the benefit of, and the expense of, OWNER for the purpose of evicting tenants in default and to recover possession of the PREMISES, to recover unpaid rents and other sums due from any tenant to settle compromise and release claims by or against any tenant, and to employ attorneys for payment of rent more than five days in arrears. OWNER agrees that AGENT is not responsible for the collection of delinquent accounts. AGENT assumes no liability for monies that are uncollectible or for any damages or costs related to the tenancy and the property. (Idaho Code, Sections 6-303, et. seq.)
- 5.6 Agent assumes no responsibility or management of personal property left by OWNER at PREMISES.
- 5.7 In the event the OWNER wishes to move back into their property requiring the tenant to break their lease, the OWNER agrees to pay the termination fee on the tenant(s) behalf and reimburse the outgoing tenant(s) any prepaid rents and any reasonable expenses to have the tenant(s) vacate the property within specified time frame. All other contractual agreements are still in force.

6. ADVERTISING

Should owner request additional advertising in addition to the advertising provided by the Sagecrest POA, this additional advertising expense will be charged to the Owner of the property. Owner shall authorize AGENT to advertise the PREMISES or portions thereof for rent, using print ads, periodicals, signs, brochures, internet/web sites, displays, or such other means as AGENT may deem proper and advisable. AGENT is authorized to place signs on the PREMISES advertising the PREMISES for rent. Newspaper ads that share space with other properties managed by AGENT shall be prorated. OWNER agrees to reimburse AGENT for all advertising costs that have been requested by OWNER, not to exceed \$200 per month. Advertising expenses may include direct costs for advertising the OWNER'S PREMISES as well as a reasonable pro-rata share of general advertising by the AGENT which is designed to collectively benefit the OWNER'S PREMISES and other properties managed by AGENT.

7. UTILITIES

- 7.1 OWNER is responsible for the payment of all utilities. OWNER must contact each utility, such as electric, gas, water, sewer, trash, and irrigation companies and provide AGENT with billing information to include account and contact numbers. If AGENT is to pay utilities on behalf of OWNER, OWNER is to set billing as follows:

Owner's Name
C/O First Rate Property Management, Inc
7150 Potomac Dr
Boise, ID 83704
321-1900

- 7.2 OWNER agrees to set up Landlord Service Agreements in the OWNER'S name but in care of AGENT using AGENTS mailing address.

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8. PROPERTY SURVEYS

AGENT agrees to perform a minimum of 12 exterior surveys per year. Such survey will be performed on a random basis to ensure Tenant compliance on a regular basis. OWNER can request an interior survey at anytime. AGENT shall perform interior surveys at its discretion or when deemed prudent by AGENT.

9. MAINTENANCE AND REPAIRS

- 9.1 AGENT is authorized to make or cause to be made, through contracted services or otherwise, all ordinary repairs and replacements reasonably necessary to preserve and maintain the PREMISES in an attractive condition and in good state of repair for the operating efficiency of the PREMISES, and all alterations required to comply with lease requirements, governmental regulations, or insurance requirements. AGENT is also authorized to purchase or rent, on OWNER's behalf, all equipment, tools, appliances, materials, supplies, and other items necessary for the management, maintenance, or operation of the PREMISES. Such maintenance expenses will be paid by the OWNER and through the OPERATING ACCOUNT. AGENT shall not be liable to OWNER for any act, omission, or breach of duty of such independent contractors or suppliers.
- 9.2 At AGENT'S discretion, a 5 % fee of gross invoices for all labor and material arranged for and contracted by AGENT for remodeling or repair of the PREMISES may be charged.
- 9.3 Due to the volume of business and AGENT'S business relationships with vendors, certain benefits in the form of rebates, gratuities and discounts are sometimes made available to AGENT and its employees. AGENT does not mark up invoices and charges to OWNERS and therefore, AGENT retains all available discounts, gratuities, and rebates. AGENT shall always award vendor contracts and otherwise deal with vendors based upon price, availability, workmanship and industry reputation.
- 9.4 Agent shall contract for bi-annual Preventative Maintenance at the expense of the Owner. The contractor will check all plumbing and plumbing fixtures, caulking, door stops, dryer vents, smoke detectors, and furnace filters and make necessary repairs. Agent agrees to back-charge tenant for tenant related expenses.
- 9.5 The expense incurred for any one transaction shall not exceed **\$250.00**, except monthly or recurring operating charges and emergency repairs, unless otherwise authorized by the OWNER, typically done via e-mail.

10. NORMAL WEAR AND TEAR DEFINED

Normal wear and tear means the deterioration that occurs based upon the use for which the rental unit is intended and without negligence, carelessness, accident, misuse, or abuse of the premises or contents by the tenants, their family, or their guests. For the purposes of this agreement, FRPM will consider the following items as normal wear and tear. (nail holes used to hang pictures, minor spot painting between tenants, traffic wear in carpet, carpet replacement after 5-7 years, scuffed hardwood floors, sometimes minor cleaning between tenants, worn toilet seats, re-keying or replacement of worn locks, blind replacement due to sun damage or paint flaking, caulking or any other preventative maintenance). (Idaho Code, Section 6-321)

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11. YARD CARE

AGENT does not provide yard care services. Yard care is considered to include but is not limited to weeding of planters, trimming of grass, edging of grass and planters, pruning and trimming of all shrubs and trees, application of weed control and fertilizer on grass, setting of any automatic timers for irrigation/sprinkler system, or the removal of garbage, debris, and animal feces. OWNER must indicate in writing who is to care for the yard, whether it is the TENANT, an independent contractor, or the OWNER themselves. AGENT agrees to inspect the exterior yard during its random property surveys and notify either the tenant or the independent contractor of deficiencies, however, at no time is AGENT responsible for the care of the yard for the PREMISES. If OWNER indicates that the yard care is to be performed by the TENANTS, either the OWNER or independent contractor assumes responsible for yard care between tenancy.

12. LEAD PAINT DISCLOSURE: Housing built before 1978 may contain lead based paint. Lead from paint, paint chips, and dust can pose health hazards if not taken care of properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, landlords and owners must disclose the presence of known lead based paint. (Idaho Code, Section 55-2504)

Owner's Acknowledgement relating to the Property (Initial if Applicable)

- | | | |
|------|---|----------|
| 12.1 | Known lead based paint/hazards are present | _____ |
| 12.2 | Has no knowledge of lead based paint/hazards | _____ MS |
| 12.3 | Has provided lead based/hazard records | _____ |
| 12.4 | Has no records pertaining to lead based paint/hazards | _____ |

13. MANAGEMENT SERVICES DO NOT INCLUDE:

Normal property management does not include monthly inspections, representation at court hearings, depositions, homeowner meetings, providing on-site management, property sales, refinancing, preparing PREMISES for sale or refinancing; supervising and coordinating modernization, rehabilitation, fire or major damage restoration projects; obtaining income tax, accounting or legal advice; advising on proposed new construction, debt collection, and counseling. If OWNER desires AGENT to perform services not included in normal property management or specified above, a fee shall be agreed upon for these services before work begins.

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14. LEGAL FEES

- 14.1 OWNER agrees to pay all expenses incurred by AGENT including, without limitation, attorney's fees for counsel employed to represent AGENT or OWNER in any proceeding or suit involving an alleged violation by the AGENT or OWNER, or both, of any constitutional provision, statute, ordinance, law or regulation of any governmental body pertaining to fair employment, Federal Fair Housing, including, without limitation, those prohibiting or making illegal discrimination on the basis of race, creed, color, religion, or national origin, marital status, or mental or physical handicap in the sale, rental or other disposition or housing or any services rendered in connection therewith, but nothing herein contained shall require the AGENT to employ counsel to represent the OWNER or himself in any such proceeding or suit. (Idaho Code, Sections 12-120 and 12-121)
- 14.2 OWNER shall not hold AGENT liable for any error of judgment or mistake of law except in cases of willful misconduct or gross negligence.
- 14.3 If any legal action or proceeding be brought by either party to enforce any part of this AGREEMENT, the prevailing party shall recover in addition to all other relief, reasonable attorney's fees and costs, but not to exceed \$750 (seven hundred fifty dollars). (Idaho Code, Sections 12-120 and 12-121)

15. INSURANCE: HOLD HARMLESS AND LIABILITY

Nothing in this AGREEMENT contained shall be construed as rendering AGENT liable for any act, omission, or occurrence resulting from or in any manner arising out of the performance of AGENT'S duties and obligations hereunder, or the exercise by AGENT of any of the powers or authority herein or hereafter granted to AGENT by OWNER, or the use of any lease or rental agreement required by OWNER. At all times this AGREEMENT is in effect, OWNER, at OWNER'S expense, must maintain in full force and effect:

- 15.1 Fire and extended coverage for all casualties and hazards customarily covered by casualty insurance in the State of Idaho for the full insurable value of the PREMISES, containing endorsements that contemplate the leasing of the property by OWNER and vacancies between lease terms; and (Idaho Code, Section 41-2401)
- 15.2 Public liability insurance naming AGENT, First Rate Property Management Inc, as additional insured. (Idaho Code, Section 41-2506(1)(a)(i))
- 15.3 Within fifteen (15) days from the effective date, OWNER must provide to AGENT a copy of a certificate of insurance evidencing the required coverage. If the insurance coverage changes in the manner or degree at any time this agreement is in effect, OWNER must provide AGENT a copy of the insurance certificate evidencing any change within ten (10) days of the change. (Idaho Code, Sections 41-1802 and 41-1824)
- 15.4 OWNER agrees to indemnify, defend and hold AGENT harmless from all claims, investigation, and lawsuits by third parties related to the PREMISES, and the management and leasing, whether occurring during the term of this AGREEMENT or after its termination, and from any claim or liability for damage to property, or injuries or death of any person.

Owner Initials MS

Last Revised: 01.19.10

FRPM RENTAL MANAGEMENT AGREEMENT

Page 7

- 15.5 It is expressly agreed and understood that all persons employed in connection with the PREMISES are employees of the OWNER and not the AGENT. The OWNER'S obligation under this Section shall include the payments of all costs, expenses, suits, claims, settlements, judgments, damages, liquidated damages, penalties, forfeitures, back pay, court costs, litigation expense, worker's compensation claims, and attorney's fees.
- 15.6 AGENT shall not be liable for any willful neglect, abuse or damage to the PREMISES by tenants, vandals, or others nor loss or damage to any personal property of OWNER.
- 15.7 If at any time during or after the term of this AGREEMENT, the PREMISES are found to be contaminated with hazardous waste, OWNER agrees to indemnify and hold AGENT harmless from all claims, demands, actions, liabilities, costs expenses, damages and obligation of any nature arising from or as a result of said hazardous waste. The foregoing indemnification shall survive the termination or expiration of the AGREEMENT. (Idaho Code, Section 9-505(2))

16. AGENT'S COMPENSATION AND EXPENSES

- 16.1 AGENT's fee shall be \$ waived monthly or 5 % of the total monthly gross receipts from PREMISES, whichever is the greater amount.
- 16.2 AGENT shall charge a one time set up fee of \$75 per owner.
- 16.3 AGENT will prepare 1099 forms for each PREMISES managed for OWNER for a fee of \$10 per form.
- 16.4 OWNER agrees to reimburse AGENT each month during the term hereof for expenses directly attributable to OWNER's property. These expenses include, but are not limited to, advertising and legal fees.
- 16.5 Any time of AGENT or AGENT's employee(s) expended in preparation for and attendance to court on OWNER'S behalf will be billed at the rate of \$75 for each eviction or \$50 per hour for other litigation. OWNER and AGENT agree such charges will be paid by the OWNER but charged to the TENANT.
- 16.6 Normal property management services do not include showing property to real estate agents, inspectors, appraisers, or prospective buyers while property is for sale. Should OWNER request AGENT to perform services not included in normal property management, a fee based at \$25 per hour may be assessed at AGENTS discretion.
- 16.7 AGENT shall receive and retain all TENANT application fees, non-sufficient fund bank fees, move-out inspection fees, non-payment delivery notice fees, termination fees, and late fees.

17. BINDING EFFECT

- 17.1 This AGREEMENT shall be binding upon the parties hereto and their respective Personal Representatives, heirs, administrators, executors, successors and assigns. OWNER acknowledges receipt of a legible copy of this fully executed AGREEMENT. Effective date is subject to receipt of all items listed on the FRPM Ownership Changeover Checklist.
- 17.2 Should any Section or any part of any Section of this AGREEMENT be rendered void, invalid, or enforceable by any reason by any court of law exercising competent jurisdiction, such a determination shall not render void, invalid, or unenforceable any other Section or any part of any Section in this AGREEMENT.

Owner Initials MS

Last Revised: 01.19.10

FRPM RENTAL MANAGEMENT AGREEMENT

Page 8

- 17.3 AGENT may change the terms under which AGENT is willing to provide service in the future under the AGREEMENT, but only by giving at least 30-days advanced written notice to OWNER.
- 17.4 The drafting, execution and delivery of this AGREEMENT by the parties have been induced by no representations, statements, warranties or agreements other than those expressed in this AGREEMENT. This AGREEMENT embodies the entire understanding of the parties, and there are no further or other agreements or understandings, written or oral, in effect between the parties relating to the subject matter hereof unless expressly referred to in this AGREEMENT.

18. TERMINATION OF AGREEMENT

- 18.1 The OWNER shall be obligated hereunder for an initial term of ONE YEAR from the commencement date set forth in paragraph 2.3 above. In the event the OWNER terminates this AGREEMENT within the initial term, the OWNER agrees to pay to the AGENT an administrative fee equal to the percentage set forth in paragraph 16.1 herein applied to the actual or projected rent for the PREMISES, or the monthly amount set forth in paragraph 16.1, whichever is applicable, for the remainder of the initial term, whether or not the PREMISES is leased or rented.
- 18.2 All provisions of this AGREEMENT that require the OWNER to have insured or to defend, reimburse, or indemnify the AGENT shall survive any termination and, if AGENT is or becomes involved in any proceeding or litigation by reason of having been the OWNER'S AGENT, such provision shall apply as if this AGREEMENT were still in effect.
- 18.3 AGENT may withhold funds for 30 days after the end of the month in which this AGREEMENT is terminated to pay bills previously incurred but not yet invoiced and to close accounts.

19. SPECIAL POWER OF ATTORNEY

KNOWN ALL MEN BY THESE PRESENTS; that the OWNER has made, constituted, and appointed and by these presents do make, constitute and appoint First Rate Property Management, Inc and its agents, true and lawful attorney for and in their name, place and stead, and for their use and benefit as follows: (Idaho Code, Section 15-12-105)

- 19.1 To let, rent and lease on such terms and conditions as said attorney in fact may deem proper and to extend or renew any lease or minimum term tenancy now or hereafter in effect, for such term or terms and at such rents and subject to such covenants, provisions and constitutions as they may deem best for the above described PREMISES.
- 19.2 To ask, demand, collect, and receive all rents and moneys, and to file receipts therefore; to order, direct, superintend, and manage all repairs, alterations, and improvements, and to make disbursements for the same; to make all purchases; in general, to do and perform all acts and things incident to management of the PREMISES and make all proper and necessary disbursements in connection therewith. AGENT shall also have full power to lease said PREMISES as provided herein and to do all acts necessary for the carrying out and execution of such leases or minimum term tenancies. Agent shall have full power to initiate, set up, terminate, or modify any and all utilities or landlord service agreements for all utilities related to the PREMISES, such as but not limited to: electric, gas, water, sewer, trash, and irrigation.

Owner Initials MS

Last Revised: 01.19.10

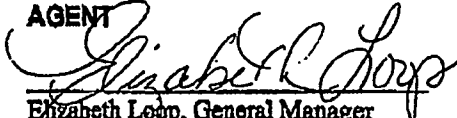
FRPM RENTAL MANAGEMENT AGREEMENT

Page 9

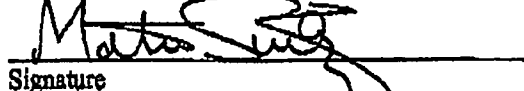
19.3 Giving and granting unto said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the above stated PREMISES, as fully to all intents and purposes as the OWNER might or could do if personally present, and hereby ratifying and conforming all that said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, the parties hereby have affixed or caused to be affixed their respective signatures this 20th day of April, 2010.

AGENT


Elizabeth Loop, General Manager
First Rate Property Management, Inc.

OWNER


Signature

1719 Roosevelt Street
Street Address

Placentia, CA 92870
City, State, & Zip

Home: n/a Cell: 714-307-3959 Work: n/a
Phone Numbers

matthewswitzer@bankofamerica.com
matthewswitzer@bankofamerica.com
Owner Email address:


Owner Tax ID or SSN

Paula Foy 562-743-7043 and 714-375-9022
Emergency Contact Name and Phone Number

Owner Initials MS



000114

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)
HYMAS, individually and as)
the natural parents of)
PRIVATE FIRST CLASS McQUEN C.)
FORBUSH, USMC (Deceased),)
and BREANNA HALOWELL,)
Plaintiffs,)

vs.)

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY)
OWNERS' ASSOCIATION, INC., an)
Idaho non-profit corporation,)
d/b/a SAGECREST MULTIFAMILY)
PROPERTY OWNERS' ASSOCIATION,)
et al.,)
Defendants.)

CONTINUED DEPOSITION OF LIZZ LOOP
PAGES 176-430

July 8, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

[Page 1]

1 A. Yes, I would be included. Not in the
2 decision, but I would be included via e-mail of
3 what was being decided.
4 Q. I believe you testified that you are
5 familiar with the contract between the POA and
6 First Rate.
7 Is that correct?
8 A. Yes.
9 Q. Are you familiar with the contract
10 between First Rate and individual owners?
11 A. At Sagecrest?
12 Q. Yes.
13 A. Yes.
14 Q. To your knowledge, was Tara ever
15 informed of or required to become familiar with the
16 contracts between the POA and the -- or the
17 contracts with the individual owners?
18 A. She was not told specifically, at least
19 by myself.
20 Q. Do you know if she was aware there were
21 separate contracts with the POA and the individual
22 owners?
23 A. I believe she was aware.
24 Q. Did you ever have a discussion with her
25 about contracts?

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[Page 74]

1 A. No.
2 Q. Do you know if anyone else did?
3 A. I don't know.
4 Q. When she began running -- or when she
5 began managing the complex, being the on-site
6 manager, did anyone, as far as you know, ever talk
7 to her about these contracts?
8 A. No.
9 Q. Whose job would it be to review the
10 contracts with her?
11 A. Myself.
12 Q. Do you feel like it would be important
13 for her to know the contracts with the owners as
14 well as the contract with the POA?
15 A. Yes.
16 Q. But you don't recall having this
17 conversation?
18 A. No.
19 Q. Did you ever review the Sagecrest CC&Rs?
20 A. Yes, skimming over them. It's so many
21 document --
22 So many CC&Rs are very similar.
23 Q. So in your position at First Rate, you
24 see CC&Rs quite a bit?
25 A. Yes. We use them to enforce.

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[Page 75]

1 Q. Okay. So you believe that a property
2 management's duties is in part to enforce the
3 CC&Rs?
4 A. Yes.
5 Q. Okay. Would you look at Exhibit 153.
6 MR. ANDERSON: Here you go.
7 Q. (BY MR. STACEY) Have you seen this
8 document before?
9 A. Yes.
10 Q. Would you turn to Bates stamp No. 2925
11 and look at 3.5.
12 This provision starts out with, "The
13 owner's right with respect to interiors: Each
14 owner shall have the exclusive right to paint,
15 repair, tile, wash, paper, or otherwise maintain,
16 refinish, and decorate the interior portions of
17 their fourplex."
18 Is that correct?
19 A. Yes.
20 Q. Does this provision, as far as you can
21 tell, say anything about global issues?
22 MR. HAMAN: I'm going to object. The
23 document speaks for itself.
24 THE WITNESS: No.
25 Q. (BY MR. STACEY) Would you go to the

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1 next page and look at 3.8.
2 After looking at that provision, would
3 you agree that the POA has the authority to go into
4 a unit and make repairs only if an owner has failed
5 to maintain his or her unit and only after taking
6 the steps outlined in that provision?
7 MR. ANDERSON: Object to the form; calls for
8 a legal conclusion.
9 MR. LOGAN: Join; lacks foundation.
10 THE WITNESS: I read it --
11 Well, can you repeat the question?
12 MR. STACEY: Would you read that.
13 (Record read by reporter.)
14 MR. ANDERSON: Same objections.
15 MR. HAMAN: I'm going to object. The
16 document speaks for itself.
17 THE WITNESS: Yes.
18 Q. (BY MR. STACEY) Okay. And I believe
19 you stated you reviewed CC&Rs in the normal course
20 of business as part of your position at First Rate.
21 Is that correct?
22 A. It's not as a normal --
23 We use them to enforce lease violations,
24 so we would go to the CC&Rs and look for that.
25 Q. And "we" being you personally would?

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[Page 77]

[23] (Pages 74 to 77)

ORIGINAL

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NO. _____
A.M. _____ FILED P.M. 4:41

JUL 24 2014

CHRISTOPHER D. RICH, Clerk
By KATRINA THIESSEN
DEPUTY

Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, d/b/a SAGECREST MULTI
FAMILY PROPERTY OWNERS''
ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

**DEFENDANT SAGECREST MULTI-
FAMILY PROPERTY OWNERS'
ASSOCIATION, INC.'S MEMORANDUM
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

COMES NOW Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,
by and through its counsel of record, Moore & Elia, LLP, and hereby submits this Memorandum
in support of its Motion for Summary Judgment. The Affidavit of Counsel, Craig Stacey, has
been contemporaneously submitted herewith.

INTRODUCTION

The facts of this incident have been set forth in numerous filings with the Court and will
not be restated in this memorandum. The Plaintiffs allege that the Sagecrest Multi-Family
Property Owners' Association, Inc. (hereafter "POA") has breached its duty of care to Mr.

Forbush and Breanna Halowell. Plaintiffs' claim that the acts and omissions constituting such breaches are:

- a. Failure to exercise reasonable care under all of the circumstances;
- b. Failure to provide and/or maintain the apartment in a safe and sanitary condition fit for human habitation;
- c. Failure to provide and/or maintain the apartment's water heater, air handler, and heating system in a reasonably safe condition;
- d. Failure to perform a reasonable inspection of the apartment – including a reasonable inspection of the apartment's water heater, air handler and ventilation system after determining the water heater was leaking carbon monoxide;
- e. Failure to test or confirm the carbon monoxide detectors were installed properly and working after delivering carbon monoxide detectors to Apartment 4624; and,
- f. Failure to adequately warn of the unreasonably dangerous condition in apartment 4624.

(*Complaint*, ¶ 15, 16).

Plaintiffs have set forth these same claims against First Rate Property Management (hereafter "FRPM"), which was the property manager at the Sagecrest complex. Plaintiffs further claim that the allegations against FRPM are imputed to Defendants Sagecrest POA and Matthew E. Switzer, Trust, (hereafter "Switzer") because FRPM was acting as the agent for these Defendants.

FRPM was the acting property manager at the Sagecrest complex at the relevant times for purposes of this motion. However, FRPM was an agent for the POA only as it concerned the common areas at the complex for which the POA has authority to control. FRPM separately managed Switzer's property at the complex. The residential living units of the complex were managed by FRPM under separate agreements with the individual Owners of the units. The POA did not have any control over the interiors of the units and did not have a legal duty to perform any of the actions that Plaintiffs have alleged it failed to do.

Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). When a motion for summary judgment has been supported by depositions, affidavits, or other evidence, the adverse party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e); *see also Gardner v. Evans*, 110 Idaho 925, 929, 719 P.2d 1185, 1189 (1986). A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing the motion. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986).

The party seeking summary judgment bears the initial burden to show there is no genuine issue of material fact, and that he or she is entitled to judgment as a matter of law. *McCorkle v. Northwestern Mut. Life Ins. Co.*, 141 Idaho 550, 554, 112 P.3d 838, 842 (Ct. App. 2005). The movant may meet this burden by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). This may be accomplished either by an affirmative showing with the moving party's own evidence or by a review of the non-movant's evidence and the contention that the required proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000).

Once an absence of evidence has been demonstrated, the burden shifts to the party opposing the motion to show through further depositions, discovery responses or affidavits that there is indeed a genuine issue for trial. *Id.* The mere existence of disputed facts, however, will

not and cannot defeat summary judgment if there is a showing that the plaintiff has failed to establish an element essential to its claim, as the failure to establish an essential element of the Plaintiff's case renders all other facts immaterial. *Barab v. Plumleigh*, 123 Idaho 890, 892, 853 P.2d 635,637 (Ct. App. 1993).

A motion for summary judgment should not be regarded with disfavor. *Celotex Corp. v. Catrett*, 477 U.S. 317,327 (1986). Rather, it should be viewed as an important part of the Rules of Civil Procedure, which are designed to "secure the just, speedy and inexpensive determination of every action." *Id.*; I.R.C.P. 1 (a).

ARGUMENT

Plaintiffs cannot establish liability of the POA for negligence because the POA does not owe the Plaintiffs a legal duty of care for any injury that occurred on the interior of unit #4624.

The elements of common law negligence are: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage. *O'Guin v. Bingham County*, 142 Idaho 49, 52 (2005). Proving each of the above four elements is essential to a plaintiff's claim in negligence. See generally, *Bakers v. Shavers, Inc.*, 117 Idaho 696, 700 (1990) ("Without a duty, there is no negligence."); *Lawton v. City of Pocatello*, 126 Idaho 454, 465 (1994) ("There can be no negligence in the absence of a breach of duty.") The defendant is entitled to summary judgment if the plaintiff fails to establish the existence of any one of the four essential elements. See, *Harris v. Department of Health and Welfare*, 123 Idaho 295, 298 (1992).

Whether a duty exists is a question of law. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 987 P.2d 300, 312 (1999). Not every person or entity owes a tort duty to

everyone else in all circumstances. *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 393-94, 179 P.3d 352, 356-57 (Ct. App. 2008) (citing *Turpen v. Granieri*, 133 Idaho 244, 247-48, 985 P.2d 669, 672-73. No liability exists under the law of torts unless the person from whom relief is sought owed a duty to the allegedly injured party.” *Vickers v. Hanover Constr. Co., Inc.*, 125 Idaho 832, 835, 875 P.2d 929, 932 (1994).

The issue of whether the POA owed Plaintiffs a duty should be examined under Idaho’s premises liability law as Plaintiffs allege that the injury occurred due to conditions on the property. *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 393, 179 P.3d 352, 356 (Ct. App. 2008) (Premises liability law governs allegations that a physical condition of the property caused injury to a third person.) The general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises in repair. *Id.*

Consistently, a tenant or lessee *having control* of the premises is deemed, so far as third parties are concerned, to be the owner, and in case of injury to third parties occasioned by the condition or use of the premises, the general rule is that the tenant or lessee may be liable for failure to keep the premises in repair. *Johnson v. K-Mart Corp.*, 126 Idaho 316, 317, 882 P.2d 971, 972 (Ct. App. 1994)

There is no caselaw directly on point regarding an alleged duty a POA may have towards a tenant or guest for the condition of the interior of a residential unit for which it has no control. There are, however, cases in Idaho that are applicable where an owner or tenant has been sued by a customer or pedestrian for injuries sustain on adjacent property in which they had no duty to control. These cases consistently hold that a party that does not control the land where injury occurred does not have a duty towards the injured party.

In *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 8 P.3d 1254 (Ct. App. 2000), a pedestrian brought a personal injury action against the owner of convenience store, seeking recovery for injuries she sustained when she slipped and fell on ice in a vacant lot adjacent to store. The plaintiff contended that the owner owed her a duty of care regardless of whether she was on land owned by Honker's. Plaintiff asserted that Honker's was "occupying" the vacant lot because patrons of Honker's were using that lot for ingress and egress. The Court disagreed holding:

As stated above, the general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises in repair. Honker's neither owned, occupied, nor controlled the premises upon which Heath fell and was injured. Heath, however, urges this Court to expand the law of negligence in Idaho so that the owner of commercial property is responsible for conditions upon unoccupied adjacent property, that it does not control, which cause injury. We conclude that such an expansion of the law should rest in the hands of the legislative branch through codification of the law of negligence as it pertains to the duty of landowners. Therefore, we hold, as a matter of law, that a commercial landowner, who has no right to control or enter adjacent property, owes no duty of care to a trespasser on that adjacent property.

134 Idaho at 714-15, 8 P.3d at 1257-58. *See also McDevitt v. Sportsman's Warehouse, Inc.*, 151 Idaho 280, 286-87, 255 P.3d 1166, 1172-73 (2011) (The Court reviewed the CC&Rs of a commercial lot in order to determine that the defendant tenant did not have control of the common areas and, therefore, did not have a duty to invitees to keep the sidewalk safe or warn of dangers.)

These cases are controlling over this case as the POA had no control over the interiors of the residential units, including unit #4624, and, therefore, had no duty to the tenants or guests to keep them safe or warn of danger.

1. The POA has no ownership interest and no authority/power over the interiors of the residential units at the Sagecrest Complex.

The POA is a non-profit entity with volunteer Board members. The POA was created to ensure the common areas of the Sagecrest complex are kept in good condition in order to help support the Owner's investments in the residential units. The POA (including the Board) does not have any employees. One Board member lives here in Boise, the other three, including Jon Kalsbeek, live out of state. The POA members have an annual meeting at the Sagecrest complex at the end of the year in which some members attend in person but the majority of members attend by phone. This is the only time the POA convenes at the complex.

The POA was granted certain areas of the Sagecrest complex from Sagecrest Development L.L.C. The POA owns these "common areas" in perpetuity and such areas are for the use and enjoyment of the owners, tenants, and guests at the complex. These areas are not to be used for financial gain by the POA or its Board members. In contrast, the residential buildings, which each have four separate living units or apartments, are individually owned by persons, trusts, corporations, or partnerships. No owners of these residential units live at the complex.

The Articles of Incorporation for the POA (hereafter "Articles") were executed in order to create a property owners' association to manage and maintain the areas of the Sagecrest complex surrounding the Residential lots.¹ The Articles set forth the general purposes and powers of the POA:

This Association does not contemplate pecuniary gain or profit to the members thereof, and the specific purposes for which it is formed are to provide for maintenance, preservation and architectural control of those certain lots as established in the Declaration of Covenants, Conditions, and Restrictions of Sagecrest Subdivision...and to promote the health, safety, and welfare of the residents within the subdivision established by

¹ The POA's Articles of Incorporation are attached to the affidavit of Craig Stacey as "Exhibit 1".

the Declarations....

(*Articles, Article 6*).

The powers, duties, and rights of the POA are also delineated in Sagecrest Development, LLC's Covenants, Conditions and Restrictions (hereafter "CCR's").² The CCR's are consistent with the Articles of Incorporation, but are set forth in more detail. The individual Owners' of the units also have powers, duties, and rights which are set forth in the CCR's.

Each Owner of a residential lot at the Sagecrest complex is a member of the POA. (*CCR's, Section 6.2*) The power of the POA is expressly limited by the Articles of Incorporation, the Bylaws, and the CCR's. (*CCR's, Section 6.7*) Such power consists of the ability to perform acts which may be necessary to the management and operation of the POA's affairs. (*Id.*)

The POA duties set forth in CCR's include the same general obligation to run the business operation of the Association as set forth in the Articles. (*Id.*) The CCR's also include POA duties to maintain certain areas of the complex including the exteriors of the residential units including the entry way, exterior stairs, railings and decks, roofs, street lamps mounted on the residential units, all sidewalks and landscaping on the property, the drainage facilities, the Common Areas (which includes the parking lots, recreational center, and drainage lot), the fence, and the irrigation system. (*CCR's, Section 3.3*)

The CCR's expressly state that the POA, subject to the rights and obligations of the Owners, has a responsibility to manage and control the common areas, the landscaped areas, sidewalks, and all improvements, and to keep such common areas in good, clean, and attractive condition and repair. (*CCR's, Section 8.6*) The common areas are limited to every part of the

² Sagecrest Development, L.L.C.'s Covenants, Conditions and Restrictions are attached to the affidavit of Michael Elia as "Exhibit 2".

residential complex except the actual interior living areas.

In contrast, the Owners have the express, exclusive right with respect to the interiors of their residential units and have the duty to maintain the interior of the residential units including appliances, plumbing and plumbing fixtures, electrical system and fixtures, and all interior components of the heating and air conditioning system. (*CCR's, Sections 3.3(B) & 3.5*). The Owners also have a duty to maintain certain exterior portions of their residential units including the outside of the windows and doors, the exterior air conditioning units and all other exterior maintenance not performed by the POA. (*Id.*)

The C.C.R.'s clearly separate the areas of the complex that the POA and the Owners' have the authority and power to control, which correspond with their duties to maintain such areas. The POA has no power or authority to perform any service on the interiors of the residential units which also means that the POA has no responsibility or duty to maintain such areas. This is a very common type of relationship for a POA and a group of owners in a development complex, referred to as a "studs in" and "studs out" relationship in the property management industry.

Plaintiffs' claims against the POA fail as a matter of law because the POA did not have a duty to inspect or maintain the water heater, air handler, heating system, or carbon monoxide detectors in unit #4624. Further, the POA did not have a duty to warn the tenants of any condition on the interior of an Owner's unit as its limited duties involve maintaining the common areas surrounding the residential units.

2. The POA did not owe a duty to Plaintiffs through its former property manager, FRPM.

As discussed above, the POA has no authority or duty to maintain any part of the interior of residential unit #4624. As a result, the POA could not direct the property manager, FRPM, to

maintain the same.

The Agreement between the POA and FRPM is in regard to “the property commonly known as Sagecrest POA” (*FRPM/POA*, 2.1) (emphasis original),³ which only include the areas of the Sagecrest complex that the POA has authority and duty to maintain in the CCR’s. FRPM General Manager, Lizz Loop, signed the Agreement with the POA. She testified that it is part of the property manager’s job to enforce the CCR’s of a complex. (*Stacey Aff., Exhibit 5, p. 76, ll. 1-4*).

Conversely, FRPM’s Agreement with the Owner of #4624, Matthew Switzer, clearly states that it is in reference to the “‘Premises’ located at 1805 Overland Rd., Bldg 46, units #11, #12, #23, & #24.”⁴ (*FRPM/Switzer*, 2.2). This Agreement states that the Owner authorizes the Agent (FRPM) to contract for services for maintenance agreements and is authorized to make all ordinary repairs and replacements reasonably necessary to preserve and maintain the premises in an attractive condition and in good state of repair. (*FRPM/Switzer* 2.5; 9.1). The only authority the POA has in regard to this property is to determine a rental amount by mutual agreement with the Agent. (*FRPM/Switzer*, 5.3).

FRPM had separate agreements with the POA and each individual Owner and was paid separately by the POA and each individual Owner. (*FRPM/POA*. 6.1; *FRPM/Switzer*, 16.5). These were separate Agreements for separate areas of the Sagecrest complex.⁵ The POA did not have authority to contract with FRPM for services on the interior of Mr. Switzer’s unit nor did they have authority to direct the manner in which FRPM selected vendors to contract with for services on the interior of Mr. Switzer’s unit. The POA cannot be liable for FRPM’s alleged

³ The Agreement between FRPM and the POA is attached to the affidavit of Craig Stacey as “Exhibit 3”.

⁴ The Agreement between FRPM and Matthew Switzer is attached to the affidavit of Craig Stacey as “Exhibit 4”.

⁵ Both Agreements have a provision which prevents modification of the Agreements. (*FRPM/POA* Agreement 10.0; *FRPM/Switzer* Agreement 17.4).


breaches and/or violations in regard to the same as a matter of law.

CONCLUSION

For the foregoing reasons, Defendant Sagecrest Multi-Family Property Owners' Association, Inc., respectfully request that this Court grant it summary judgment and dismiss all of Plaintiff's claims against the Defendant with prejudice.

DATED this 24 day of July, 2014.

MOORE & ELIA, LLP

By: 
Michael J. Elia, Attorney for Defendant Sagecrest
Multi-Family Property Owners' Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24 day of July, 2014, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

**REPLY MEMORANDUM IN
SUPPORT OF DEFENDANTS
KALSBECK, ARLA, SCHWAB AND
MEISNER'S MOTION TO DISMISS
NEGLIGENCE CLAIM**

COME NOW Defendants Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner
(collectively hereinafter, the "POA Officers"), by and through their counsel of record, John M.
Howell of the firm Brassey, Crawford & Howell, PLLC, and hereby submit this reply memorandum
in support of their Motion to Dismiss Negligence Claim (the "Motion").

I. INTRODUCTION

The POA Officers' Motion is appropriately granted because the Plaintiffs' Complaint fails to state a negligence claim against the individual POA Officers and none of the arguments raised by Plaintiffs in their response brief are availing.

II. DISCUSSION

Plaintiffs' make three arguments in opposing the POA Officer's Motion: (1) Idaho law requires only a general duty of care; (2) the POA Officers assumed a duty of care with regards to Plaintiffs; and (3) Idaho Code § 30-3-39 is inapplicable. For the reasons set forth herein, each of these arguments is unavailing and the POA Officers' Motion to Dismiss Negligence Claim is appropriately granted.

A. *Idaho Law Does not Recognize a General Duty of Care Absent a Special Relationship Between the Parties or an Assumed Undertaking.*

In response to the POA Officers' Motion, Plaintiffs first argue that the POA Officers owed them a broad, general duty of care to prevent unreasonable, foreseeable risks of harm to others. (*Pltf.'s Resp. to Def't's Mot. to Dismiss* ("Resp Br."), 3.) In support of this argument, Plaintiffs cite *Rountree v. Boise Baseball, LLC*, 154 Idaho 167, 171, 296 P.3d 373, 377 (2013): "Generally speaking, every person, in the conduct of his business, has a duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others." (internal citations and quotations omitted). Plaintiffs recognize that *Rountree*'s broad characterization of Idaho duty law stands in conflict with the Idaho Supreme Court's more narrow ruling with regards thereto in *Beers v. Corp. of Pres. of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 316 P.3d 92, 98 (2013): "Absent unusual circumstances, a person has no duty to prevent harm to another, regardless of foreseeability.

Idaho law recognizes two circumstances in which a person has an affirmative duty of care to another: a special relationship or an assumed duty based on an undertaking.”

Plaintiffs argue that *Beers* is a limited ruling applicable only to “classic duty to rescue cases” and that “the general duty to exercise due care stated in *Rountree* remains.” (*Resp. Br.*, 3-4.) A careful reading of *Beers* however, as well as a review of the citing history of both *Beers* and *Rountree*, reveals that Plaintiffs’ argument is unavailing. *Beers*’ ruling regarding the scope of duty under Idaho negligence law is controlling and applicable in this case.

First, as a threshold matter of precedent, *Beers* was decided on December 11, 2013, nearly a full year subsequent to *Rountree*, which was decided on February 22, 2013.

Second, the plain language of *Beers* demonstrates the applicability of its narrower ruling regarding the scope of duty to all Idaho negligence law. *Beers* was a general negligence case alleging that the LDS church negligently failed to prevent physical harm suffered by a minor child when the child jumped into a stream and injured her leg when she struck a rock. *Beers*, 316 P.3d at 96. The issue was whether the LDS church owed the plaintiff a “duty of care”, *Id.*, not whether a “duty to rescue” existed based upon a defendant happening upon an *in extremis* plaintiff. *Beers* is thus not some form of niche “classic duty to rescue case” as mis-characterized by Plaintiffs; it is an archetypal general negligence claim in which the Supreme Court considered whether the defendants owed a duty of care to the plaintiffs by virtue of either (1) a special relationship, or (2) an assumed undertaking.

Furthermore, under Idaho law, a “duty to rescue” case, despite Plaintiffs’ attempts to characterize them as a niche area of negligence law, is nothing more than an example of an undertaking, one of the two categories of duties recognized under Idaho law: “A beach-goer may assume a duty to rescue a drowning swimmer in a non-negligent manner by undertaking to do so,

but that same beach-goer has no obligation to rescue anyone else.” *Beers*, 316 P.3d at 100 (emphasis added).

The *Beers* plaintiffs attempted to rely on a “general duty of care” theory, identical to that advanced by Plaintiffs in this case, as stated in *Doe v. Garcia*, 131 Idaho 578, 581, 961 P.2d 1181, 1184 (1998). *Id.* at 97. The *Beers* Court rejected application of *Doe*’s “general duty of care” to the negligence claim brought by the plaintiffs: “The broad statement the Beerses rely upon is not generally applicable to the world at large . . . Absent unusual circumstances, a person has no duty to prevent harm to another, regardless of foreseeability.” *Id.* at 98 (emphasis added). The *Beers* Court in no way limited its ruling to “classic duty to rescue” cases, stating its ruling in terms of “general applicab[ility]” and referring without limitation or caveat to the duty of “a person to prevent harm to another.”

Third, *Beers* and *Rountree* can be traced back to the exact same root cases, thereby obviating Plaintiffs’ argument that *Beers* and *Rountree* contemplate distinct areas of negligence law. For its “general duty of care” ruling, *Rountree* cited *Turpen v. Granieri*, 133 Idaho 244, 985 P.2d 669 (1999). *Turpen*, in turn, cited *Sharp v. W.H. Moore Inc.*, 118 Idaho 297, 796 P.2d 506 (1990), for the “general duty of care” conception of duty. *Sharp* cited two Idaho cases for the “general duty of care”: *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980), and *Harper v. Hoffmann*, 95 Idaho 933, 523 P.2d 536 (1974).

Beers cited *Hunter v. State, Dep’t of Corr., Div. of Prob. & Parole*, 138 Idaho 44, 50, 57 P.3d 755, 761 (2002), which abrogated the “general duty of care” theory, identical to the duty theory advanced by Plaintiffs in this case, set forth in *Doe v. Garcia*, 131 Idaho 578, 581, 961 P.2d 1181, 1184 (1998). The source of the “general duty of care” theory set forth in *Doe* was two Idaho cases: *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980), and *Sharp v. W.H. Moore, Inc.*, 118 Idaho

297, 796 P.2d 506 (1990). It is thus clear that *Beers* and *Rountree* do not contemplate distinct types of negligence cases as Plaintiffs argue, but rather flow from the same two root cases: *Alegria* and *Sharp*, that set forth a “general duty of care” theory. *Beers*’ more narrow ruling regarding the scope of duty under Idaho negligence law is controlling and applicable in this case.

B. The Complaint Alleges no Duty of Care With Regards to the Plaintiffs Undertaken by the POA Officers.

Next, Plaintiffs summarily argue that the POA Officers “voluntarily undertook to evaluate the danger of CO poisoning at the Sagecrest apartments; to purchase equipment for, and supervise, a program of CO testing; and to control what information – if any – regarding this threat would be provided to tenants (and therefore, in turn, their guests).” (*Resp. Br.*, 5.) This statement is utterly devoid of any citations to Plaintiffs’ complaint, as would be necessary to ascertain whether a claim has been adequately pled for purposes of a motion to dismiss.

The lack of citations is explained by the fact that Plaintiffs’ Complaint¹, as addressed in the POA Officers’ Motion, wholly fails to allege an individual undertaking on the part of any of the POA Officers. The Complaint makes only four factual allegations regarding the individual POA Officers:

On information and belief, First Rate informed the president and officers of the Sagecrest POA and building owner the trustee of the Matthew E. Switzer, Trust of the dangerous conditions caused by the defective water heaters well before November 10, 2012. However, despite this knowledge, none of these defendants took the appropriate action to rectify or alleviate the deadly situation that existed in Building 46 and throughout the Sagecrest complex. *TAC*, ¶ 33.

Following PFC Forbush’s death, the Sagecrest POA, and each of its officers named herein sent a letter to First Rate prohibiting First Rate from warning other tenants of the dangers at the complex. ‘I am instructing you to make no comments and to have no discussion with anyone, whether media representatives, tenants, owners, or anyone concerning the recent events at Sagecrest involving the death of a young man as the alleged result of CO poisoning.’ *TAC*, ¶ 43.

¹ Plaintiffs have been granted limited leave to file a Fourth Amended Complaint, but have not yet done so. Citations are to Plaintiffs Third Amended Complaint (“TAC”).

In September 2011, the Sagecrest Board of Directors approved a contract with Engineering Consultants Incorporated “ECI,” a local engineering firm, to conduct a ‘Water Heater Site Investigation’ at Sagecrest. ECI confirmed the problem was with the ‘flame arrestor’ or intake vent clogging on A.O. Smith water heaters and reported its findings to the Sagecrest Board of Directors and First Rate. *TAC*, ¶ 50.

Defendant Kalsbeek interceded after the March 2012 meeting with Intermountain Gas and directed First Rate personnel to disregard the testing procedures as instructed by Intermountain Gas. Kalsbeek directed First Rate not to test the water heater flu, but to test in the apartment. *TAC*, ¶ 54.

It must be kept in mind that in order to state a valid claim against the POA Officers individually, Plaintiffs’ complaint must allege an undertaking on the part of each individual POA Officer, not an undertaking by the POA as an entity. Indeed, Plaintiffs’ Complaint unambiguously asserts that the POA Officers were acting within their respective capacities as officers of the Sagecrest POA at all relevant times. *TAC*, ¶¶ 5-8. The allegations against the POA Officers cannot be construed as alleging an undertaking of an individual duty with regards to the Plaintiffs by any of the individual POA Officers.

C. The POA Officers’ Motion Cited Idaho Code § 30-3-39 for the Limited Rule that the POA Officers are not Liable for the Acts of the POA.

Lastly, Plaintiffs argue that the “directors can be held liable for their own torts.” (*Resp. Br.*, 5.) Plaintiffs misinterpret the POA Officers limited reliance on Idaho Code § 30-3-39, which states that a “member of a [non-profit] corporation is not, as such, personally liable for the acts, debts, liabilities or obligations of the corporation.” The POA Officers simply cited § 30-3-39 for the axiomatic principle that, to the extent Plaintiffs’ complaint fails to allege any individual undertaking on the part of the POA Officers, the POA Officers cannot be held liable for “acts, debts, liabilities or obligations” attributable solely to the POA as an entity.

Contrary to the thrust of Plaintiffs' argument, the POA Officers do not take the position that § 30-3-39 in any manner limits the POA Officers' (theoretical) liability for their own, individual acts. Rather, the POA Officers take the position, discussed *supra*, that Plaintiffs' Complaint fails to allege any undertaking on the part of the POA Officers as individuals. As § 30-3-39 means that the acts of the POA cannot be attributed to the POA Officers individually, such infirmity in pleading is fatal to Plaintiffs' claims against the individual POA Officers.

III. CONCLUSION

For the reasons stated herein, none of the Plaintiffs' arguments opposing the POA Officers Motion to Dismiss Negligence Claim are availing and that Motion is appropriately granted.

DATED this 24th day of July, 2014.

BRASSEY, CRAWFORD & HOWELL, PLLC

By 

John M. Howell, Of the Firm
Attorneys for Defendants Jon Kalsbeek, Jay
Arla, Christopher Schwab and David Meisner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of July, 2014, I served a true and correct copy of the foregoing, upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

**TRAVIS FORBUSH and GRETCHEN
HYMAS**, individually and as the natural parents
of **PRIVATE FIRST CLASS MCQUEN C.
FORBUSH, USMC (Deceased), and BREANNA
HALOWELL**,

Plaintiffs,

vs.

**SAGECREST MULTI FAMILY
PROPERTY OWNERS' ASSOCIATION,
INC.** et al.,

Defendants.

Case No. CV PI 13-04325

**AFFIDAVIT OF FRPM PRESIDENT
TONY DROST IN SUPPORT OF
TONY DROST'S MOTION FOR
SUMMARY JUDGMENT**

STATE OF IDAHO)
) ss.
County of Ada)

TONY DROST, having been first duly sworn upon oath, deposes and says as follows:

AFFIDAVIT OF FRPM'S PRESIDENT TONY DROST IN SUPPORT OF TONY DROST'S
MOTION FOR SUMMARY JUDGMENT - 1

000139

ORIGINAL

28

1. Your Affiant is a Defendant in the above-entitled action. The information contained herein is of your Affiant's own personal knowledge.
2. I am the president of First Rate Property Management, Inc. (hereafter referred to as FRPM), a registered Idaho corporation. FRPM's business can be described as property management.
3. FRPM was formed as an Idaho corporation on September 28, 2000, and has continued to operate as an Idaho corporation in good standing from the date of formation until present.
4. Attached herewith as **Exhibit A** are true and correct copies of FRPM's Articles of Incorporation filed with the Idaho Secretary of State on September 28, 2000.
5. Attached herewith as **Exhibit B** are true and correct copies of FRPM's Annual Reports on file with the Idaho Secretary of State for 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, and 2014.
6. With respect to the above captioned matter, I was the president of FRPM during the relevant time frame of 2010-2012. As president of FRPM, I was paid for such service, and received a W-2.
7. FRPM's structure is such that FRPM has three basic departments: (1) Leasing; (2) Accounting; and (3) Maintenance.
8. Each department has a supervisor who would manage other FRPM employees, and would report to FRPM's general manager.
9. During the time frame of 2010 – 2012, FRPM's general manager was Lizz Loop.
10. FRPM's general manager would report to FRPM's president.
11. Attached as **Exhibit C**, is an organizational diagram for FRPM's general structure during 2010-2012.

12. In my capacity as president of FRPM, I managed the company from an executive level position.
13. At any given point during the time frame of 2010 – 2012, FRPM maintained an average of ten (10) employees. None of those employees were related to me or members of my family.
14. During the same period, FRPM managed, on average, 800 units per month, including approximately 172 of the 192 units at Sagecrest Complex. As such, the Sagecrest account represented slightly less than 22% of FRPM's rental management accounts.
15. As president of FRPM, I was kept in the loop regarding FRPM corporate matters, while delegating responsibility to and relying upon other FRPM employees involved in the typical day-to-day property management activities of FRPM, as they occurred.
16. The Sagecrest Complex is made up of forty-eight (48) apartment buildings with four (4) apartments or "units" per building. Each building is separately owned.
17. The owners are members in the Sagecrest Multi Family Property Owners' Association ("SPOA").
18. Beginning in March 2010, FRPM agreed to become the property manager for the SPOA and for forty-four (44) of the forty-eight (48) apartment buildings at the Sagecrest Apartment Complex (hereafter "Sagecrest Complex").
19. In conjunction with that event, FRPM entered into a contract with the SPOA (*See*, Depo. Ex. 105, attached as Exhibit G to *Affidavit of Robert A. Mills in Support of Tony Drost's Motion for Summary Judgment* dated July 25, 2014.)
20. Further, in conjunction with that event, FRPM entered into 44 separate property management contracts, one for each respective building managed by FRPM at the Sagecrest Complex. (*See*, *eg.*, Depo. Ex. 54, copy of Rental Management Agreement between Building 46 owner,

Matthew Switzer, and FRPM dated March 15, 2010, attached as Exhibit C to *Mills Aff. ISO Drost MSJ*, provided as one example of such agreements).

21. The various Rental Management Agreements made FRPM the agent of the owners.
22. The POA Agreement was executed by FRPM general manager, Lizz Loop, and SPOA president Jon Kalsbeek. (Depo. Ex. 105, *supra*)
23. The Rental Management Agreement between Building 46 owner Matthew Switzer, and FRPM was executed by FRPM general manager Lizz Loop, and owner Matthew Switzer. (Depo. Ex. 54, *supra*)
24. In fact, I was not a signatory on the POA Agreement, and I was not a signatory on any of the property management agreements between FRPM and the various individual building owners for the forty-four (44) buildings managed by FRPM at the Sagecrest Complex.
25. The execution of such agreements was managed by other employees at FRPM; particularly, the general manager, Lizz Loop.
26. While it can be said that FRPM was the agent of the building owners; I was not, personally or individually, the agent of the building owners.
27. Additionally, as the agent for each building owner, FRPM was responsible for entering into rental agreements with each tenant, in each unit, of each building.
28. As an example of such rental agreements, FRPM executed an April 8, 2011 Rental Agreement with Adra Kipper, for her leasehold tenancy of Apartment 4624, the Unit at issue. (*See, eg.*, Depo. Ex. 4, attached as Exhibit A to *Mills Aff. ISO Drost MSJ*)
29. During the time frame of March 2010 through December 2012, it is safe to state that FRPM executed more than 172 such rental agreements (calculated as at least one rental agreement for

each unit managed at Sagecrest Complex during 2010-2012). In fact, the number of FRPM/tenant rental agreements is actually greater than one per unit as new agreements would be executed with new tenants whenever there was a “turnover”¹ for a unit during 2010-2012. In any event, FRPM executed at least 172 such agreements.

30. I was not a signatory on any of the more than 172 rental agreements.
31. I never met Adra Kipper, the tenant who occupied Unit 4624, and I have never been in Unit 4624 or in any Unit in Building 46 at the Sagecrest Complex.
32. I never personally spoke with Matthew Switzer, the owner of Building 46, until after the incident at issue.
33. Travis Forbush, Gretchen Hymas, Breanna Halowell, and/or McQuen Forbush have never been parties to any contract with FRPM or any contract executed by FRPM as agent for a principal. Likewise, prior the incident at issue, I never met or contracted with any of the Plaintiffs or McQuen Forbush.
34. At all times relevant to the above captioned proceeding, my involvement at Sagecrest Complex was limited to my role as an officer of FRPM.
35. All of my actions as president of FRPM and as related to FRPM’s management at the Sagecrest Complex were solely undertaken and performed in the course and scope of my role as an officer of FRPM.
36. All of my actions as president of FRPM and as related to FRPM’s management at the Sagecrest Complex were executed with reasonable fiduciary responsibility and without violation of any law.

¹ “Turnovers” are a term used to describe when a tenant moved out of a Unit and it was being prepared for

37. During 2012, in reference to FRPM's involvement at the Sagecrest Complex, Jon Kalsbeek, the President of the SPOA, described the relationship between FRPM and the SPOA as follows:

Little over 2 years ago when starting with FRPM, our conversations covered how SC, as a stand alone complex, would be operated at the direction of the POA board of directors.

FRPM is the association manager and take direction from the board of directors in regard to SC.

(See, Depo. Ex. 141, p. 1, attached as Exhibit K to *Mills Aff. ISO Drost MSJ*)

38. Over time, the direction from the SPOA Board with respect to FRPM's management of the Sagecrest Complex included "global issues" that were complex-wide.

39. For example, in 2010, the SPOA directed FRPM to provide and install, at SPOA cost, furnace filters for each of the units to address a complex-wide problem involving freezing coils in the hydronic heating and cooling systems.

40. Another such "global issue" came to FRPM's attention in the summer of 2011, when FRPM learned that there was a concern regarding carbon monoxide (CO) emissions from some of the water heaters at Sagecrest.

41. During this period of time, FRPM learned that testing of water heaters had occurred in units throughout the complex and those water heaters with high CO readings were replaced.

42. FRPM also learned, in the same general timeframe that the water heaters were being replaced, that a building owner, Bill Raff, had suggested that the SPOA retain a mechanical engineer to review the situation and propose long-term solutions.

43. Eventually, FRPM came to learn that a local engineering firm, Engineering Consulting, Inc. (ECI), was retained by the SPOA and produced a report on September 16, 2011.

the next occupancy.

44. That report recommended various actions that the owners should take to deal with the CO/water heater issue which had arisen.
45. As president of FRPM, I recall that ECI's recommendations were discussed with the owners at the October 31, 2011 Annual Meeting of the SPOA, and were set forth in the minutes for that meeting. (*See*, Depo. Ex. 55A attached as Exhibit D to *Mills Aff. ISO Drost MSJ*) Also at that meeting, it was recommended that the building owners install permanent CO detectors in their units at "turnovers." Such recommendations were communicated to each owner and such action seemed reasonable and appropriate.
46. The SPOA also asked FRPM employee Tara Gaertner to provide cost estimates to the owners for implementing potential water heater replacement recommendations of the ECI mechanical engineer and for installing hard-wired combination smoke and CO detectors. She did so on November 11, 2011. (*See*, Depo. Ex. 57 attached as Exhibit E to *Mills Aff. ISO Drost MSJ*)
47. Pursuant to SPOA directions, FRPM employee Tara Gaertner started testing the units for CO every three months, while at the same time changing the furnace (air handler) filters in each of the units.
48. Ultimately, the SPOA instructed Ms. Gaertner to use a CO tester ("CGI") purchased by the SPOA to conduct such testing.
49. Ms. Gaertner recorded her findings on a chart and reported those findings to SPOA president Jon Kalsbeek, and individual building owners when high testing results were confirmed in their respective buildings.
50. I had no involvement with the testing or data collection of CO emissions of the water heaters.

51. On March 9, 2012, Tara Gaertner tested all water heaters at Sagecrest using the POA's CGI and found several which had high CO readings and that FRPM had some of those water heaters replaced on March 9, 2012.
52. Sometime after that point in time I learned that FRPM distributed battery-operated CO detectors to those units which had tested high in March 2012, including Unit 4624, which was leased to Adra Kipper. Such action by FRPM seemed reasonable and appropriate.
53. Since the incident, I have learned that batteries and instructions accompanied the CO detectors, along with a notice advising the tenant to properly activate and operate the CO detector. (*See, Depo. Ex. 14 attached as Exhibit B to Mills Aff. ISO Drost MSJ*)
54. At some point in time prior to the incident, I learned that on March 12, 2012, Intermountain Gas came to the complex at Tara Gaertner's request and re-tested those water heaters which previously had high readings and had not yet been replaced.
55. In fact, the water heater in Unit 4624 was tested by Intermountain Gas on March 12, 2012, and Intermountain Gas determined that such water heater had a reading of 19 ppm CO in the "hood"/flue of the water heater and none found outside of the flue, which it deemed a normal reading. (*See, Depo. Ex. 47 attached as Exhibit N to Mills Aff. ISO Drost MSJ*)
56. As a result of the fact that Intermountain Gas found no high gas readings or concerns regarding the water heaters that were tested (including the water heater in Unit 4624), further water heater replacement efforts at that specific time were halted, because, at that point in time, none of the water heaters at the Sagecrest Complex had any confirmed high CO readings.
57. Sometime after March 22, 2012, as president of FRPM, I had learned that during the testing on March 9, 2012, Mr. Kalsbeek was advised that one of his unit's water heaters had tested high,

and that, after further testing on March 12, 2012, Mr. Kalsbeek was told that the water heater showed no signs of any CO emissions. (See, Depo. Ex. 133 attached as Exhibit I to *Mills Aff. ISO Drost MSJ*)

58. Sometime after March 22, 2012, as a result of the March 2012 testing information and pursuant to his authority over “global issues,” Mr. Kalsbeek told me that he had had a concern about the testing procedures being utilized by Tara Gaertner on March 9, 2012.

59. At that time, I learned that as a result of such concern, Mr. Kalsbeek independently decided to travel to Boise, Idaho, to meet with Ms. Gaertner, Missy Rushing (another FRPM part-time resident manager at Sagecrest), and a FRPM maintenance coordinator, Sheila Thomason, regarding the testing procedures that the SPOA wanted FRPM to utilize at the Sagecrest Complex pursuant to the SPOA’s authority with respect to “global issues.” In fact, I did not learn of Mr. Kalsbeek’s concern or this meeting until after it had occurred.

60. Mr. Kalsbeek met with these FRPM employees on March 20, 2012 to develop written CO testing procedures for the Sagecrest Complex. I was not in attendance at that meeting, nor involved in the development of written testing procedures.

61. On March 22, 2012, Mr. Kalsbeek sent the written procedures he wanted Tara Gaertner and other FRPM employees to use while testing at the Sagecrest Complex. (See, Depo. Ex. 210 attached as Exhibit L to *Mills Aff. ISO Drost MSJ*)

62. Mr. Kalsbeek told me later that his desire was to have “written” testing procedures that would be followed at Sagecrest complex each time a water heater was tested. This action seemed reasonable and appropriate as prepared and directed to FRPM by the SPOA.

63. During that conversation, Mr. Kalsbeek assured me that, although the May 22, 2012 written procedures were different from those Tara Gaertner had been using prior to March 9, 2012 (which were based upon her experience with Intermountain Gas), he (Mr. Kalsbeek) had spoken with Intermountain Gas prior to his meeting with FRPM's employees and that his procedures accurately reflected the information he had obtained from Intermountain Gas for CO testing. This seemed reasonable to me.

64. The written procedures also addressed the installation of CO detectors and read as follows:

Carbon monoxide/smoke detector combos are to eventually be installed in every unit by replacing the existing smoke detector currently in the hallway area. CO monitors shall be changed out or replace existing smoke detectors in the hallway area during – turnovers, preventative maintenance, lease renewals, or faulty smoke detector – until complete.

65. Pursuant to the SPOA's directive on this "global issue," FRPM began using these written testing procedures and was reporting the results to Mr. Kalsbeek.

66. These written procedures and the backup information were sent to the owners by Mr. Kalsbeek prior to May 20, 2012. (*See*, Depo. Ex. 141 attached as Exhibit K to *Mills Aff. ISO Drost MSJ*)

67. In fact, this was confirmed in the minutes of the next annual meeting of the SPOA held on October 26, 2012. (*See*, Depo. Ex. 139 attached as Exhibit J to *Mills Aff. ISO Drost MSJ*)

68. On October 10, 2012, a tenant, Molly Collins, reported that the hard-wired CO detector installed in her unit (Unit 3324) had sounded an alarm and her water heater was then immediately replaced.

69. After the Molly Collins' incident on October 11, 2012, Tara Gaertner followed the established protocol for global issues such as CO testing and the installation of CO detectors by contacting Mr. Kalsbeek to inquire if she could have "Chris [Sagecrest's maintenance man] go into every

unit and check and make sure the CO detectors that we installed are in working condition. The units that do not have CO detectors I would like him to install one.” (See, Depo. Ex. 123 attached as Exhibit H to *Mills Aff. ISO Drost MSJ*) Mr. Kalsbeek replied the same day: “We will discuss this further. I will talk to the Board and see how the Board wants to proceed.”

70. Mr. Kalsbeek then gathered additional information about the testing and installation of CO detectors from Ms. Gaertner and eventually asked me and Tara Gaertner to meet him on October 25, 2012, at which time, he suggested that Ms. Gaertner could have tested Unit 3324 again after Ms. Collins had called Intermountain Gas and the Meridian Fire Department.

71. During that meeting, he also asked Ms. Gaertner about the number of permanent, hardwired CO detectors which had been installed at Sagecrest and Ms. Gaertner informed him that several had been installed during turnovers during the summer and that preventive maintenance was also underway, at which time CO detectors were being installed, as well.

72. Mr. Kalsbeek agreed that this was an appropriate plan for installing the CO detectors and that it should continue to be followed.

73. As a result of the October 25, 2012 meeting, Mr. Kalsbeek revised the CO testing procedures he had prepared on March 22, 2012, to add language requiring the testing of a unit every time a CO detector activated and to “continuously” install hard-wired CO detectors during “turnovers, preventive maintenance, lease renewals, or faulty smoke detector.” As of October 25, 2012, from my position as president of FRPM, the plan as set forth by the SPOA seemed both reasonable and appropriate.

74. As of October 25, 2012, it was FRPM's understanding that, as a result of these written procedures, CO detectors were being installed on regular basis and that CO testing was continuing, and that the plan set forth by the SPOA seemed both reasonable and appropriate.
75. Shortly after these revised procedures were prepared, I also came to understand that Ms. Gaertner had a conversation with the Meridian Fire Marshall on October 30, 2012, during which she explained the measures which were being taken regarding the CO detectors, the water heater replacements, the recommendations of the mechanical engineer, and the testing for CO every 90 days.
76. The Fire Marshall stated that these steps seemed "diligent" to him, and that he was happy with the efforts being undertaken. (*See*, Depo. Ex. 68 attached as Exhibit F to *Mills Aff. ISO Drost MSJ*)
77. On November 2, 2012 (eight days before the incident at issue), as president of FRPM, I sent an email entitled "Notice of Termination of Management" to the Board of the SPOA to inform them that FRPM was terminating all management services at Sagecrest Complex and that a subsequent notice would be sent to each individual owner. (*See*, Depo. Ex. 125 attached as Exhibit M to *Mills Aff. ISO Drost MSJ*) The Notice of Termination of Management informed the SPOA that such termination would be effective at the end of 2012.
78. Even though FRPM was and did cease its management operations at Sagecrest Complex by the end of 2012, FRPM has continued to operate, and was managing more than 600 units at the beginning of 2013, and it has not laid off any employees since management operations at the Sagecrest Complex ceased.

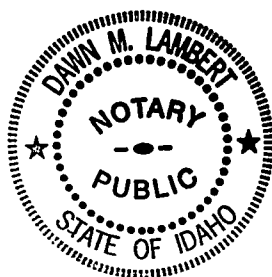
79. It was not until after the incident of November 10, 2012, that I, or any FRPM Managers, learned that, because the written testing procedures from Mr. Kalsbeek were always producing a "zero" CO reading, Tara Gaertner had decided that only random testing of the units was necessary.


FURTHER your Affiant saith not.


TONY DROST

SUBSCRIBED AND SWORN to before me this 25 day of July, 2014.

(SEAL)




Notary Public for Idaho
Residing at 7150 W. Potomac Idaho
My Commission Expires 12.12.17

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25 day of July, 2014, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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Attorneys for Plaintiffs

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<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	E-Mail

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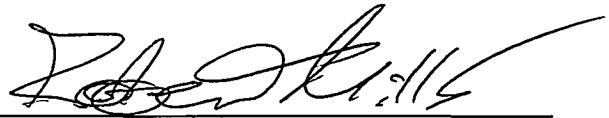
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Jay Arla, Chris Schwab and David
Meisner*

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Robert A. Anderson



ARTICLES OF INCORPORATION (General Business)

To the Secretary of State of the State of Idaho

The undersigned, in order to form a Corporation under the provisions of Title 30, Chapter 1, Idaho Code, submits the following articles of Incorporation:

FILED/EFFECTIVE
SEP 28 AM 10:24
SECRETARY OF STATE
STATE OF IDAHO

Article 1: The name of the corporation shall be: First Rate Property Management, Inc.

Article 2: The number of shares the corporation is authorized to issue is: 10,000

Article 3: The street address of the registered office is: 13415 W. Annabrook Dr. Boise, ID 83713
and the registered agent at such address is: Tony Drost

Article 4: The name and address of the incorporator are: Tony Drost
13415 W. Annabrook Dr. Boise, ID 83713

Article 5: The mailing address of the corporation shall be: 13415 W. Annabrook Dr.
Boise, ID 83713

Optional articles:

Customer Acct #:

(if using pre-paid account)

Secretary of State use only
IDAHO SECRETARY OF STATE

09/28/2000 09:00

CK: 12015 CT: 136626 BH: 351429

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Signature of an incorporator:

Tony Drost

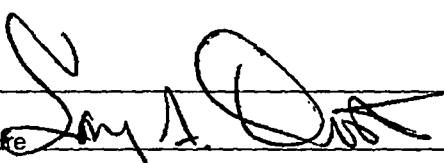
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EXHIBIT

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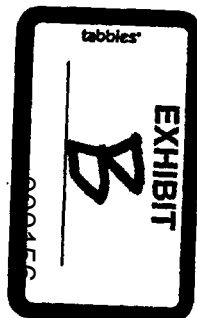
09/28/55


No. C 135785	Due no later than Sep 30, 2001		2. Registered Agent and Office NO PO BOX
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE	Annual Report Form		TONY DROST
	: Mailing Address - Correct in this box, if applicable FIRST RATE PROPERTY MANAGEMENT, INC 13415 W ANNABROOK DR 2072 N. WOODFORD AVE. BOISE, ID 83713 MERIDIAN, ID 83642		13415 W ANNABROOK DR 2072 N. WOODFORD AVE. BOISE, ID 83713 MERIDIAN, ID 83642
3. New Registered Agent Signature			
4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors.			
Office held	Name	Street or P.O. Address	City State Zip
PRESIDENT	TONY A. DROST	2072 N. WOODFORD AVE	MERIDIAN ID 83642
SECRETARY	PATRICIA J. DROST	2072 N. WOODFORD AVE	MERIDIAN ID 83642
5. Organized Under the Laws of: IDAHO C 135785		6. Signature  Date 07/18/01 Name (Typed or Printed) TONY A. DROST Title PRESIDENT	

Issued 07/02/2001

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No. C 135785	Due no later than Sep 30, 2002		2. Registered Agent and Office NO PO BOX																		
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	1. Mailing Address - Correct in this box, if applicable FIRST RATE PROPERTY MANAGEMENT, INC 2072 N WOODFORD AVE MERIDIAN, ID 83642		3. New Registered Agent Signature																		
	4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors. <table border="1"> <thead> <tr> <th>Office held</th> <th>Name</th> <th>Street or P.O. Address</th> <th>City</th> <th>State</th> <th>Zip</th> </tr> </thead> <tbody> <tr> <td>PRESIDENT</td> <td>TONY A. DROST</td> <td>2072 N. WOODFORD AVE</td> <td>MERIDIAN</td> <td>ID</td> <td>83642</td> </tr> <tr> <td>SECRETARY</td> <td>LIZZ LOOP</td> <td>2072 N. WOODFORD AVE</td> <td>MERIDIAN</td> <td>ID</td> <td>83642</td> </tr> </tbody> </table>				Office held	Name	Street or P.O. Address	City	State	Zip	PRESIDENT	TONY A. DROST	2072 N. WOODFORD AVE	MERIDIAN	ID	83642	SECRETARY	LIZZ LOOP	2072 N. WOODFORD AVE	MERIDIAN	ID
Office held	Name	Street or P.O. Address	City	State	Zip																
PRESIDENT	TONY A. DROST	2072 N. WOODFORD AVE	MERIDIAN	ID	83642																
SECRETARY	LIZZ LOOP	2072 N. WOODFORD AVE	MERIDIAN	ID	83642																
5. Organized Under the Laws of: IDAHO C 135785	6. Signature  Date <u>07/15/02</u> Name (Typed or Printed) <u>TONY A. DROST</u> Title <u>PRESIDENT</u>																				

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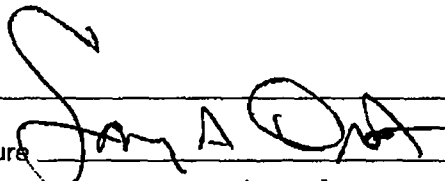
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4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors.

Office held	Name	Street or P.O. Address	City	State	Zip
PRESIDENT	TONY A DROST	2072 N. WOODFORD AVE	MERIDIAN	ID	83642
SECRETARY	ELIZABETH LOOP	2072 N. WOODFORD AVE	MERIDIAN	ID	83642

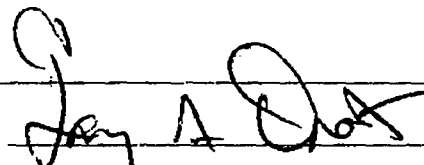
5. Organized Under the Laws of: <div style="text-align: center;">IDAHO C 135785</div>	6. <div style="text-align: center; font-size: 2em; margin-bottom: 10px;">S</div> <div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> Signature  Name (Typed or Printed) TONY A DROST </div> <div style="width: 35%;"> Date 07/14/03 Title PRESIDENT </div> </div>
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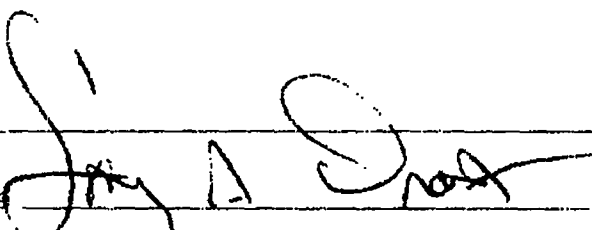
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NO FILING FEE IF RECEIVED BY DUE DATE			3. New Registered Agent Signature		
4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors.					
<u>Office held</u>	<u>Name</u>	<u>Street or P.O. Address</u>	<u>City</u>	<u>State</u>	<u>Zip</u>
PRESIDENT	TONY A. DROST	10673 W HALSTEAD LN, 102	BOISE	ID	83713
SECRETARY	LIZZ LOOP	10673 W HALSTEAD LN, #102	BOISE	ID	83713
5. Organized Under the Laws of: IDAHO C 135785		6. Signature  Date 07/12/04 Name (Typed or Printed) TONY A DROST Title PRESIDENT			

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4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors.					
<u>Office held</u>	<u>Name</u>	<u>Street or P.O. Address</u>	<u>City</u>	<u>State</u>	<u>Zip</u>
PRESIDENT	TONY DROST	13415 W ANNABROOK	BOISE	ID	83713
V. PRESIDENT	LIZZ LOOP	3133 N. ASH PARK LN	BOISE	ID	83704
TREASURER	JEFF BEEBE	4706 FAIRVIEW AVE	BOISE	ID	83706
5. Organized Under the Laws of: IDAHO C 135785		6. Signature  Date <u>7/18/05</u> Name <small>(Typed or Printed)</small> <u>TONY A DROST</u> Title <u>PRESIDENT</u>			

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BOISE, ID 83720-0080

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FIRST RATE PROPERTY MANAGEMENT, INC
~~10673 W HALSTEAD LN STE 102~~
~~BOISE, ID 83713~~
7150 POTOMAC
BOISE, ID 83704

TONY DROST
~~10673 W HALSTEAD LN #102~~
~~BOISE, ID 83713~~
7150 POTOMAC
BOISE, ID 83704

NO FILING FEE IF
RECEIVED BY DUE DATE

3. New Registered Agent Signature

4. Corporations: Enter Names and Business Addresses of President, Secretary and Directors.

<u>Office held</u>	<u>Name</u>	<u>Street or P.O. Address</u>	<u>City</u>	<u>State</u>	<u>Zip</u>
PRESIDENT	TONY DROST	7150 POTOMAC	BOISE	ID	83704
V. P.	LIZZ LOOP	7150 POTOMAC	BOISE	ID	83704
TREASURER	JEFF BEEBE	4708 FAIRVIEW AVE	BOISE	ID	83706

5. Organized Under the Laws of:

IDAHO
C 135785

6.

Signature

Date

7/19/06

Name (Typed or Printed)

TONY A DROST

Title

PRESIDENT

000161

Issued 07/03/2006

Do Not Tape or Staple

200609005466

No. C 135785	Due no later than Sep 30, 2007 Annual Report Form		Registered Agent and Address (NO PO BOX)			
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE	1. Mailing Address: Correct in this box if needed. FIRST RATE PROPERTY MANAGEMENT, INC. TONY A DROST 7150 POTOMAC BOISE ID 83704		TONY DROST 7150 POTOMAC BOISE ID 83704			
		3. <u>New</u> Registered Agent Signature:*				
4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).						
Office Held	Name	Street or PO Address	City	State	Country	Postal Code
SECRETARY	JENNIFER E DROST	7150 POTOMAC	BOISE	ID	USA	83704
TREASURER	LIZZ LOOP	7150 POTOMAC	BOISE	ID	USA	83704
PRESIDENT	TONY A DROST	7150 POTOMAC	BOISE	ID	USA	83704
5. Organized Under the Laws of: ID C 135785		6. Annual Report must be signed.* Signature: Tony A Drost Name (type or print): Tony A Drost Date: 10/09/2007 Title: President				
Processed 10/09/2007		* Electronically provided signatures are accepted as original signatures.				

No. C 135785		Due no later than Sep 30, 2008 Annual Report Form		Registered Agent and Address (NO PO BOX)			
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE		1. Mailing Address: Correct in this box if needed. FIRST RATE PROPERTY MANAGEMENT, INC. TONY A DROST 7150 POTOMAC BOISE ID 83704		TONY DROST 7150 POTOMAC BOISE ID 83704			
				3. <u>New</u> Registered Agent Signature:*			
4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).							
Office Held	Name	Street or PO Address	City	State	Country	Postal Code	
SECRETARY	JENNIFER E DROST	7150 POTOMAC	BOISE	ID	USA	83704	
TREASURER	LIZZ LOOP	7150 POTOMAC	BOISE	ID	USA	83704	
PRESIDENT	TONY A DROST	7150 POTOMAC	BOISE	ID	USA	83704	
5. Organized Under the Laws of:		6. Annual Report must be signed.*					
ID C 135785		Signature: Tony A Drost			Date: 07/17/2008		
		Name (type or print): Tony A Drost			Title: President		
Processed 07/17/2008		* Electronically provided signatures are accepted as original signatures.					

No. C 135785		Due no later than Sep 30, 2009		Registered Agent and Address (NO PO BOX)	
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE		1. Mailing Address: Correct in this box if needed. FIRST RATE PROPERTY MANAGEMENT, INC. TONY A DROST 7150 POTOMAC BOISE ID 83704		TONY DROST 7150 POTOMAC BOISE ID 83704	
				3. <u>New</u> Registered Agent Signature:*	
4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).					
Office Held	Name	Street or PO Address	City	State	Country Postal Code
SECRETARY	JENNIFER E DROST	7150 POTOMAC	BOISE	ID	USA 83704
TREASURER	LIZZ LOOP	7150 POTOMAC	BOISE	ID	USA 83704
PRESIDENT	TONY A DROST	7150 POTOMAC	BOISE	ID	USA 83704
5. Organized Under the Laws of:		6. Annual Report must be signed.*			
ID C 135785		Signature: Tony A Drost		Date: 07/21/2009	
		Name (type or print): Tony A Drost		Title: President	
Processed 07/21/2009		* Electronically provided signatures are accepted as original signatures.			

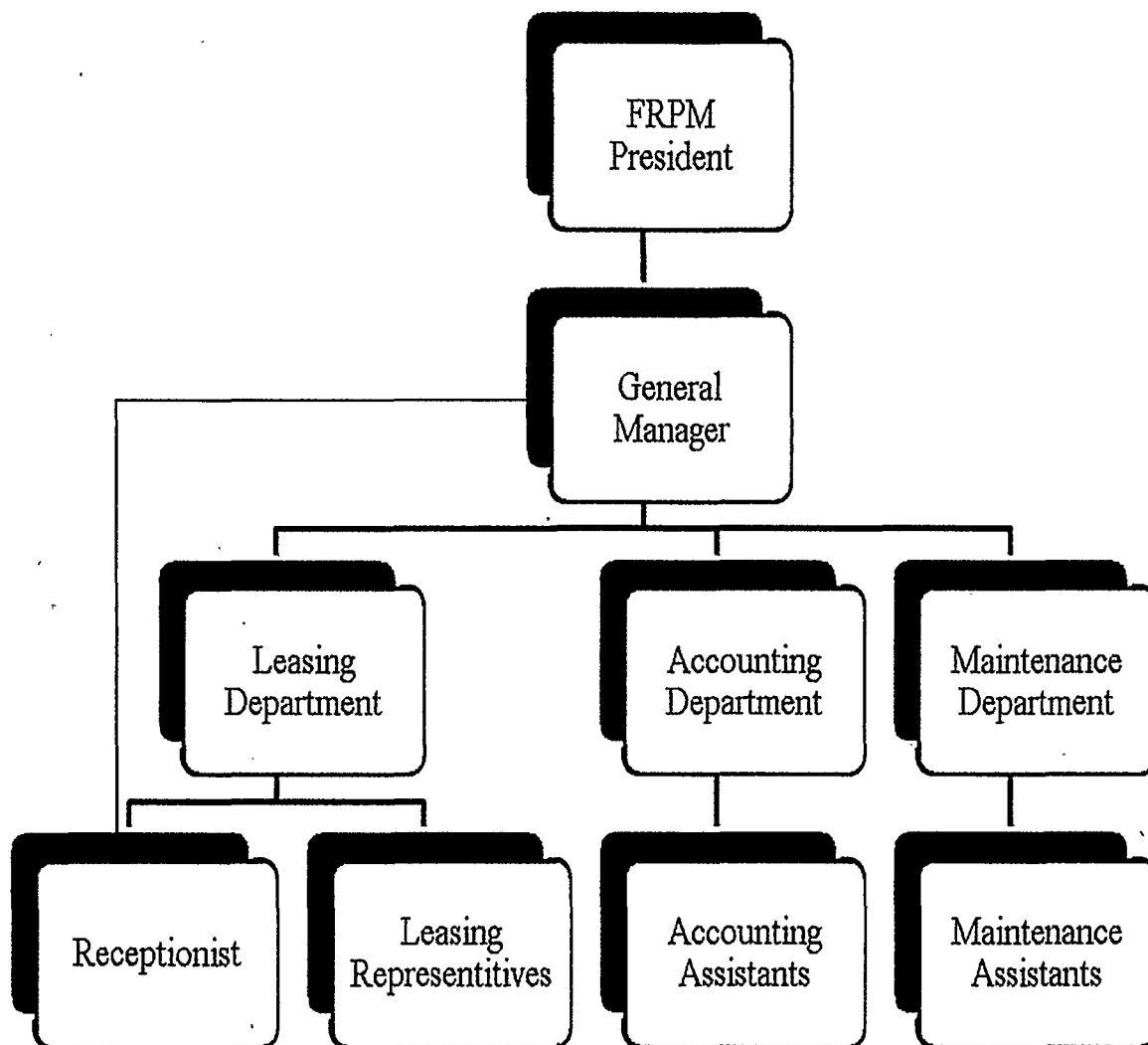
No. C 135785		Due no later than Sep 30, 2010 Annual Report Form		Registered Agent and Address (NO PO BOX)		
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE		1. Mailing Address: Correct in this box if needed. FIRST RATE PROPERTY MANAGEMENT, INC. TONY A DROST 7150 POTOMAC BOISE ID 83704		TONY DROST 7150 POTOMAC BOISE ID 83704		
				3. <u>New</u> Registered Agent Signature:*		
4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).						
Office Held	Name	Street or PO Address	City	State	Country	Postal Code
SECRETARY	JENNIFER E DROST	7150 POTOMAC	BOISE	ID	USA	83704
TREASURER	LIZZ LOOP	7150 POTOMAC	BOISE	ID	USA	83704
PRESIDENT	TONY A DROST	7150 POTOMAC	BOISE	ID	USA	83704
5. Organized Under the Laws of:		6. Annual Report must be signed.*				
ID C 135785		Signature: Tony A Drost		Date: 07/13/2010		
		Name (type or print): Tony A Drost		Title: President		
Processed 07/13/2010		* Electronically provided signatures are accepted as original signatures.				

No. C 135785		Due no later than Sep 30, 2011 Annual Report Form		Registered Agent and Address (NO PO BOX)		
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE		1. Mailing Address: Correct in this box if needed. FIRST RATE PROPERTY MANAGEMENT, INC. TONY A DROST 7150 POTOMAC BOISE ID 83704		TONY DROST 7150 POTOMAC BOISE ID 83704		
				3. <u>New</u> Registered Agent Signature:*		
4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).						
Office Held	Name	Street or PO Address	City	State	Country	Postal Code
SECRETARY	JENNIFER E DROST	7150 POTOMAC	BOISE	ID	USA	83704
TREASURER	LIZZ LOOP	7150 POTOMAC	BOISE	ID	USA	83704
PRESIDENT	TONY A DROST	7150 POTOMAC	BOISE	ID	USA	83704
5. Organized Under the Laws of:		6. Annual Report must be signed.*				
ID C 135785		Signature: Tony A Drost		Date: 07/15/2011		
		Name (type or print): Tony A Drost		Title: President		
Processed 07/15/2011		* Electronically provided signatures are accepted as original signatures.				

No. C 135785		Due no later than Sep 30, 2012 Annual Report Form		Registered Agent and Address (NO PO BOX)		
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE		1. Mailing Address: Correct in this box if needed. FIRST RATE PROPERTY MANAGEMENT, INC. TONY A DROST 7150 POTOMAC BOISE ID 83704		TONY DROST 7150 POTOMAC BOISE ID 83704		
				3. <u>New</u> Registered Agent Signature:*		
4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).						
Office Held	Name	Street or PO Address	City	State	Country	Postal Code
SECRETARY	JENNIFER E DROST	7150 POTOMAC	BOISE	ID	USA	83704
TREASURER	LIZZ LOOP	7150 POTOMAC	BOISE	ID	USA	83704
PRESIDENT	TONY A DROST	7150 POTOMAC	BOISE	ID	USA	83704
5. Organized Under the Laws of: ID C 135785		6. Annual Report must be signed.* Signature: Tony A Drost Name (type or print): Tony A Drost Date: 07/13/2012 Title: President				
Processed 07/13/2012		* Electronically provided signatures are accepted as original signatures.				

No. C 135785		Due no later than Sep 30, 2013 Annual Report Form		Registered Agent and Address (NO PO BOX)		
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE		1. Mailing Address: Correct in this box if needed. FIRST RATE PROPERTY MANAGEMENT, INC. TONY A DROST 7150 POTOMAC BOISE ID 83704		TONY DROST 7150 POTOMAC BOISE ID 83704		
				3. <u>New</u> Registered Agent Signature:*		
4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).						
Office Held	Name	Street or PO Address	City	State	Country	Postal Code
SECRETARY	JENNIFER E DROST	7150 POTOMAC	BOISE	ID	USA	83704
TREASURER	LIZZ LOOP	7150 POTOMAC	BOISE	ID	USA	83704
PRESIDENT	TONY A DROST	7150 POTOMAC	BOISE	ID	USA	83704
5. Organized Under the Laws of:		6. Annual Report must be signed.*				
ID C 135785		Signature: Tony A Drost		Date: 07/15/2013		
		Name (type or print): Tony A Drost		Title: President		
Processed 07/15/2013		* Electronically provided signatures are accepted as original signatures.				

No. C 135785		Due no later than Sep 30, 2014 Annual Report Form		Registered Agent and Address (NO PO BOX)			
Return to: SECRETARY OF STATE 700 WEST JEFFERSON PO BOX 83720 BOISE, ID 83720-0080 NO FILING FEE IF RECEIVED BY DUE DATE		1. Mailing Address: Correct in this box if needed. FIRST RATE PROPERTY MANAGEMENT, INC. TONY A DROST 7150 POTOMAC BOISE ID 83704		TONY DROST 7150 POTOMAC BOISE ID 83704			
				3. <u>New</u> Registered Agent Signature:*			
4. Corporations: Enter Names and Business Addresses of President, Secretary, and Directors. Treasurer (optional).							
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TREASURER	LIZZ LOOP	7150 POTOMAC	BOISE	ID	USA	83704	
PRESIDENT	TONY A DROST	7150 POTOMAC	BOISE	ID	USA	83704	
5. Organized Under the Laws of:		6. Annual Report must be signed.*					
ID C 135785		Signature: Tony A Drost			Date: 07/14/2014		
		Name (type or print): Tony A Drost			Title: President		
Processed 07/14/2014		* Electronically provided signatures are accepted as original signatures.					



000170

AUG 07 2014

CHRISTOPHER D. RICH, Clerk
By KYLE MEREDITH
DEPUTY

ERIC R. CLARK (ISB # 4697)
CLARK & ASSOCIATES, ATTORNEYS
PO Box 2504
Eagle, ID 83616
208-830-8084 / 208-939-7136 fax

G. BRYAN ULMER, ulmer@spencelawyers.com
TYSON E. LOGAN, logan@spencelawyers.com
MICHAEL F. LUTZ (ISB # 9218), mlutz@spencelawyers.com
THE SPENCE LAW FIRM, LLC
PO Box 548, 15 S. Jackson St.
Jackson, WY 83001
307-733-7290 / 307-733-5248 fax

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF ADA

<p>TRAVIS FORBUSH and GRETCHEN HYMAS, individually and as the natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased), and BREANNA HALOWELL,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION <i>et</i> <i>al.</i>,</p> <p>Defendants.</p>	<p>Case No. CV PI 1304325</p> <p>DECLARATION OF ERIC R. CLARK IN OPPOSITION TO DEFENDANT SWITZER'S MOTION FOR SUMMARY JUDGMENT</p>
--	---

Eric R. Clark declares and states as follows:

1. I am over 18 years of age and am competent to make this affidavit.
2. I am an attorney of record for the Plaintiffs in the above-captioned case.

3. Attached hereto as Exhibit 1 is a true and correct copy of the Management Agreement between First Rate Property Management and Switzer.
4. Attached hereto as Exhibit 2 is a true and correct copy the lease agreement between Adra Kipper and First Rate Property Management, acting as the agent of Switzer.
5. Attached hereto as Exhibit 3 are true and correct copies of the relevant portions of the deposition of Matthew Switzer.
6. Attached hereto as Exhibit 4 is a true and correct copy of an email dated 4/15/11, bates stamped FR 4799.
7. Attached hereto as Exhibit 5 is a true and correct copy of the daily log from Sagecrest Apartments, bates stamped FR 2255.
8. Attached hereto as Exhibit 6 is a true and correct copy of an email chain dated 7/20/11, bates stamped FR 1417-1418.
9. Attached hereto as Exhibit 7 is a true and correct copy of an email dated 7/29/11, bates stamped FR 7098-7101.
10. Attached hereto as Exhibit 8 is a true and correct copy of a letter from Express Plumbing dated July 2011, bates stamped Express Plumbing 06-07.
11. Attached hereto as Exhibit 9 is a true and correct copy of the minutes of the 2011 Annual Meeting of the Sagecrest Property Owners Association, bates stamped SPOA 988-989.
12. Attached hereto as Exhibit 10 is a true and correct copy of an email dated 5/31/11, bates stamped Switzer 0166.
13. Attached hereto as Exhibit 11 is a true and correct copy of an email dated 11/9/11, bates stamped FR 3001-3002.
14. Attached hereto as Exhibit 12 is a true and correct copy of an email dated 11/9/11, bates stamped Switzer 209.
15. Attached hereto as Exhibit 13 is a true and correct copy of CO testing results from Sagecrest Apartments, bates stamped FR 5818-5822.
16. Attached hereto as Exhibit 14 is a true and correct copy of a notice regarding Carbon Monoxide, bates stamped MPD 303.

17. Attached hereto as Exhibit 15 are true and correct copies of the relevant portions of the deposition of Adra Kipper.

18. Attached hereto as Exhibit 16 are true and correct copies of the relevant portions of the deposition of Tara Gaertner.

19. Attached hereto as Exhibit 17 are true and correct copies emails concerning CO testing procedures, bates stamped FR163-164, 278-280.

20. Attached hereto as Exhibit 18 are true and correct copies of invoices from Anfinson Plumbing, bates stamped as APM 251-280.

21. Attached hereto as Exhibit 19 are true and correct copies of the records form the Meridian Fire Department regarding a CO call on October of 2012, bates stamped as MFD 03-07.

22. Attached hereto as Exhibit 20 is a true and correct copy of an email dated 10/22/11, bates stamped FR 2728.

23. Attached hereto as Exhibit 21 are true and correct copies of the relevant portions of the deposition of Elizabeth Loop.

24. Attached hereto as Exhibit 22 is a true and correct copy of an email dated 10/29/11, bates stamped Switzer 268-271.

I declare under penalty of perjury under the laws of the State of Idaho and the law of the United States, that the foregoing is true and correct.

DATED this 7th day of August, 2014.



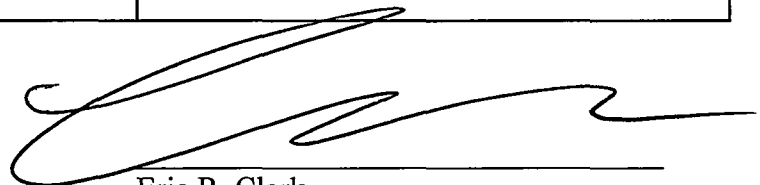
Eric R. Clark

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of August, 2014, I caused a true and correct copy of the foregoing to be served via email, addressed to the following:

James D. LaRue jdl@elamburke.com Matthew Walters mlw@elamburke.com ELAM & BURKE, PA	Mark Tripp tripp.mark@bradshawlaw.com Jason C. Palmer palmer.jason@bradshawlaw.com BRADSHAW, FOWLER, PROCTOR &
---	--

PO Box 1539 Boise, ID 83701 Fax: (208) 384-5844 <i>For A.O. Smith</i>	FAIRGRAVE, P.C. 801 Grand Avenue, Suite 3700 Des Moines, IA 50309-8004 Fax: (515) 246-5808 <i>For A.O. Smith</i>
Michael Elia mje@mbelaw.net Craig Stacey Craig@mbelaw.net MOORE & ELIA, LLP PO Box 6756 Boise, ID 83707 Fax: (208) 336-7031 <i>For Sagecrest POA</i>	John M. Howell jhowell@brassey.net BRASSEY, CRAWFORD & HOWELL, PLLC 203 W. Main Street PO Box 1009 Boise, Idaho 83701-1009 Facsimile: (208) 344-7077 <i>For Kalsbeek, Arla, Schwab, and Meisner</i>
Michael Haman mlhaman.law@gmail.com HAMAN LAW OFFICE 923 North 3rd Street P.O. Box 2155 Coeur d' Alene, ID 83816-2155 Fax: (208) 676-1683 <i>For Mathew E. Switzer and the Mathew E. Switzer Trust</i>	William A. Fuhrman BFuhrman@idalaw.com Christopher Graham CGraham@idalaw.com JONES GLEDHILL FUHRMAN GOURLEY, P.A. 225 North 9th Street, Suite 820 Post Office Box 1097 Boise, Idaho 83701 Facsimile: (208) 331-1529 <i>For Anfinson Plumbing</i>
Robert Anderson raanderson@ajhlaw.com Robert A. Mills rmills@ajhlaw.com ANDERSON, JULIAN & HULL LLP C.W. Moore Plaza 250 South Fifth Street, STE 700 PO Box 7426 Boise, ID 83707-7426 Fax: 208.344.5510 <i>For First Rate Property Management & Drost</i>	



Eric R. Clark



7150 W. Potomac Dr. • Boise, ID 83704 • (208) 321-1900 • Fax: (208) 321-1901

Check us out on the web at: www.frpmrentals.com

**FIRST RATE PROPERTY MANAGEMENT, Inc.
RENTAL MANAGEMENT AGREEMENT**

1. AGREEMENT

THIS AGREEMENT is made and entered this 15th day of March, 2010, by and between Matthew E. Switzer (hereinafter called "OWNER") and First Rate Property Management, Inc. (hereinafter called "AGENT").

2. APPOINTMENT OF AGENT

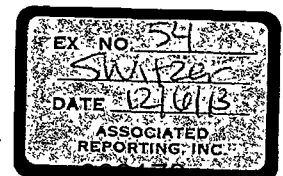
- 2.1 OWNER hereby appoints AGENT as sole and exclusive agent of OWNER to manage the PREMISES described in paragraph 2.2 upon the terms and conditions provided herein. AGENT accepts the appointment and agrees to furnish the services of its organization for the management of the PREMISES.
- 2.2 The property to be managed by AGENT under this AGREEMENT (the "PREMISES") is located at 1805 E. Overland, Bldg. 46 #11, #12, #23 and #24 the city of Meridian in the state of Idaho.
- 2.3 This AGREEMENT is on a month-to-month basis, commencing on the 14th day of March, 2010, and either party may terminate this AGREEMENT upon 30 days written notice delivered to the other party, subject to the provisions of paragraph 18.1 herein.
- 2.4 OWNER warrants that OWNER is the sole owner of the PREMISES, or has unconditional authority to execute this AGREEMENT on behalf of any CO-OWNER and that the PREMISES are not subject to current legal action or foreclosure. Any individual OWNER shall have authority to hereafter take action and enter into further agreements with AGENT on behalf of all CO-OWNERS.
- 2.5 OWNER authorizes AGENT to contract for services to include but not limited to, water, sewer, garbage, gas, electric, irrigation, yard care, maintenance agreements; and coin operated washer and dryers. OWNER to assume the obligation of any contracts entered.

Owner Initials MS

Last Revised: 01.19.10

FRPM RENTAL MANAGEMENT AGREEMENT

Page 1



3. BANKING

AGENT shall utilize its Operating Account for the deposit of receipts and collections as described herein. Funds in the account shall remain the property of the OWNER subject to disbursement of expenses by AGENT as described in this AGREEMENT. AGENT'S Operating Account is a common account used for Owners represented by AGENT.

- 3.1 AGENT shall collect all rents, charges and other amounts receivable on OWNER's account in connection with the management of the PREMISES. Such receipts shall be deposited in the account maintained by the AGENT for the PREMISES. OWNER authorizes AGENT to endorse any and all checks drawn to the order of OWNER for deposit to such operating account.
- 3.2 If OWNER chooses, AGENT can electronically transfer monthly proceeds directly to OWNER'S account. Otherwise all Cash Distributions will be sent via check.
- 3.3 OWNER acknowledges that all interest amounts received by AGENT on any lease income, operating funds, security and other deposits, or any other amounts held in the Operating Account shall be retained by AGENT or as directed by the State of Idaho.
- 3.4 AGENT shall comply with all applicable state or local laws concerning the responsibility for security deposits. Security deposits will be deposited in the account maintained by the AGENT for the PREMISES. AGENT shall collect and maintain all tenant deposits, such as security deposits, cleaning and damage deposits, pet deposits, cable/satellite deposits, and any other deposits in which AGENT deems necessary to collect from TENANT. OWNERS of new accounts agree to provide an accounting of all security deposits and to supply AGENT with matching funds prior to the execution of this AGREEMENT. Should the PREMISES sell or upon termination of this AGREEMENT, OWNER authorizes AGENT to deduct any outstanding fees owed by TENANT to AGENT from the security deposits prior to releasing these funds. (Idaho Code, Section 6-321)
- 3.5 Owner shall be responsible for the payment of all mortgage/notes, property taxes, special assessments, Homeowner Association fees, special assessments, all utilities as listed in paragraph 7.1 of this AGREEMENT, and premiums for casualty and liability insurance relating to the PREMISES unless otherwise modified in writing with AGENT.
- 3.6 Owner shall maintain a minimum balance of \$200 (two hundred dollars) per property at all times.
- 3.7 Upon acceptance of the request to make payments for those items listed in Section 3.5 of this AGREEMENT, AGENT will disperse funds accordingly, provided that OWNER'S account has sufficient funds. OWNER agrees to provide all necessary information and funds to AGENT to ensure proper and timely payments and hold AGENT harmless for any costs or responsibilities due to late payments. If AGENT is to make payments to any of the aforementioned entities, OWNER agrees to notify each entity and to authorize AGENT to call and access account information. OWNER bears sole responsibility for payments, late fees, lost payments, and/or any damages.
- 3.8 From the Operating Account, AGENT is hereby authorized to pay or reimburse itself for all expenses and costs of operating the PREMISES, including AGENT's compensation and expense reimbursements. Owner's funds shall be kept separate from AGENT's funds and operating expenses.

Owner Initials MS

Last Revised: 01.19.10

FRPM RENTAL MANAGEMENT AGREEMENT

Page 2

- 3.9 At the discretion of AGENT, any balance of the OWNERS account due and owing AGENT and not paid within 10 days of constructive notice will accrue interest at Eighteen percent (18%) per annum however not less than Twenty-Five Dollars (\$25) per month, until paid in full. Mailing of monthly statement of income and expenses indicating a deficient OWNER balance shall be sufficient notice to OWNER of balance due. (Idaho Code, Section 28-22-104)
- 3.10 OWNER agrees to keep all mortgages, property taxes, association fees, or any other obligations which could lead to a foreclosure action against the property current and paid in full. Should AGENT be notified that a foreclosure action has been initiated against the PREMISES, OWNER authorizes AGENT to freeze all OWNER related funds to that property and AGENT will not make any further disbursements to OWNER until a reserve balance of \$1,000 (one thousand dollars) is created. OWNER will have 30 days to correct and make all obligations current. Should OWNER fail to stop the foreclosure process, OWNER authorizes AGENT to release the TENANT from their rental agreement and all future rental payments, refund the security deposit to the TENANT, and deduct from OWNER'S funds on hand all amounts due to AGENT or TENANT including, but not limited to, any refund to TENANT of prorated rents or expenses and all management fees and other fees as described within this AGREEMENT.

4. FINANCIAL AND OTHER REPORTS

AGENT shall issue to OWNER itemized statements by the 25th day of each month which will include an accounting of all income and expenses related to the property.

5. LEASING AND RENTING

- 5.1 AGENT shall use all reasonable effort to keep the PREMISES rented by procuring tenants for the PREMISES. AGENT is authorized to negotiate, prepare and execute all leases, including renewals and extensions of leases and to cancel and modify existing leases, utilizing AGENT forms and agreements exclusively.
- 5.2 During the term of this AGREEMENT, OWNER shall not authorize any other person, to negotiate or act as rental agent with respect to any leases for the PREMISES.
- 5.3 Rental amount shall be determined by mutual agreement between the Sagecrest POA and AGENT. OWNER understands that the AGENT recommends rental amounts based on a Comparative Market Analysis of similar properties within the area of the OWNER'S property.
- 5.4 OWNER and AGENT agree to follow all Federal and Local Fair Housing Laws. If OWNER should at any time request AGENT to disregard Fair Housing laws and/or Landlord/Tenant Laws, this contract will be terminated immediately and the management fees for the balance of this contract or \$500, whichever is greater, will be due immediately. (Idaho Code, Section 18-7303)

Owner Initials MS

Last Revised: 01.19.10

FRPM RENTAL MANAGEMENT AGREEMENT

Page 3

- 5.5 With OWNER approval, AGENT shall have authority on behalf of the OWNER to terminate any lease or rental agreements covering the PREMISES that are in default, to execute and serve such legal or other notices as AGENT deems appropriate, to institute legal actions for the benefit of, and the expense of, OWNER for the purpose of evicting tenants in default and to recover possession of the PREMISES, to recover unpaid rents and other sums due from any tenant to settle compromise and release claims by or against any tenant, and to employ attorneys for payment of rent more than five days in arrears. OWNER agrees that AGENT is not responsible for the collection of delinquent accounts. AGENT assumes no liability for monies that are uncollectible or for any damages or costs related to the tenancy and the property. (Idaho Code, Sections 6-303, et. seq.)
- 5.6 Agent assumes no responsibility or management of personal property left by OWNER at PREMISES.
- 5.7 In the event the OWNER wishes to move back into their property requiring the tenant to break their lease, the OWNER agrees to pay the termination fee on the tenant(s) behalf and reimburse the outgoing tenant(s) any prepaid rents and any reasonable expenses to have the tenant(s) vacate the property within specified time frame. All other contractual agreements are still in force.

6. ADVERTISING

Should owner request additional advertising in addition to the advertising provided by the Sagecrest POA, this additional advertising expense will be charged to the Owner of the property. Owner shall authorize AGENT to advertise the PREMISES or portions thereof for rent, using print ads, periodicals, signs, brochures, internet/web sites, displays, or such other means as AGENT may deem proper and advisable. AGENT is authorized to place signs on the PREMISES advertising the PREMISES for rent. Newspaper ads that share space with other properties managed by AGENT shall be prorated. OWNER agrees to reimburse AGENT for all advertising costs that have been requested by OWNER, not to exceed \$200 per month. Advertising expenses may include direct costs for advertising the OWNER'S PREMISES as well as a reasonable pro-rata share of general advertising by the AGENT which is designed to collectively benefit the OWNER'S PREMISES and other properties managed by AGENT.

7. UTILITIES

- 7.1 OWNER is responsible for the payment of all utilities. OWNER must contact each utility, such as electric, gas, water, sewer, trash, and irrigation companies and provide AGENT with billing information to include account and contact numbers. If AGENT is to pay utilities on behalf of OWNER, OWNER is to set billing as follows:

Owner's Name
C/O First Rate Property Management, Inc
7150 Potomac Dr
Boise, ID 83704
321-1900

- 7.2 OWNER agrees to set up Landlord Service Agreements in the OWNER'S name but in care of AGENT using AGENT'S mailing address.

Owner Initials MS

Last Revised: 01.19.10

FRPM RENTAL MANAGEMENT AGREEMENT

Page 4

8. PROPERTY SURVEYS

AGENT agrees to perform a minimum of 12 exterior surveys per year. Such survey will be performed on a random basis to ensure Tenant compliance on a regular basis. OWNER can request an interior survey at anytime. AGENT shall perform interior surveys at its discretion or when deemed prudent by AGENT.

9. MAINTENANCE AND REPAIRS

- 9.1 AGENT is authorized to make or cause to be made, through contracted services or otherwise, all ordinary repairs and replacements reasonably necessary to preserve and maintain the PREMISES in an attractive condition and in good state of repair for the operating efficiency of the PREMISES, and all alterations required to comply with lease requirements, governmental regulations, or insurance requirements. AGENT is also authorized to purchase or rent, on OWNER's behalf, all equipment, tools, appliances, materials, supplies, and other items necessary for the management, maintenance, or operation of the PREMISES. Such maintenance expenses will be paid by the OWNER and through the OPERATING ACCOUNT. AGENT shall not be liable to OWNER for any act, omission, or breach of duty of such independent contractors or suppliers.
- 9.2 At AGENT'S discretion, a 5 % fee of gross invoices for all labor and material arranged for and contracted by AGENT for remodeling or repair of the PREMISES may be charged.
- 9.3 Due to the volume of business and AGENT'S business relationships with vendors, certain benefits in the form of rebates, gratuities and discounts are sometimes made available to AGENT and its employees. AGENT does not mark up invoices and charges to OWNERS and therefore, AGENT retains all available discounts, gratuities, and rebates. AGENT shall always award vendor contracts and otherwise deal with vendors based upon price, availability, workmanship and industry reputation.
- 9.4 Agent shall contract for bi-annual Preventative Maintenance at the expense of the Owner. The contractor will check all plumbing and plumbing fixtures, caulking, door stops, dryer vents, smoke detectors, and furnace filters and make necessary repairs. Agent agrees to back-charge tenant for tenant related expenses.
- 9.5 The expense incurred for any one transaction shall not exceed \$250.00, except monthly or recurring operating charges and emergency repairs, unless otherwise authorized by the OWNER, typically done via e-mail.

10. NORMAL WEAR AND TEAR DEFINED

Normal wear and tear means the deterioration that occurs based upon the use for which the rental unit is intended and without negligence, carelessness, accident, misuse, or abuse of the premises or contents by the tenants, their family, or their guests. For the purposes of this agreement, FRPM will consider the following items as normal wear and tear. (nail holes used to hang pictures, minor spot painting between tenants, traffic wear in carpet, carpet replacement after 5-7 years, scuffed hardwood floors, sometimes minor cleaning between tenants, worn toilet seats, re-keying or replacement of worn locks, blind replacement due to sun damage or paint flaking, caulking or any other preventative maintenance). (Idaho Code, Section 6-321)

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11. YARD CARE

AGENT does not provide yard care services. Yard care is considered to include but is not limited to weeding of planters, trimming of grass, edging of grass and planters, pruning and trimming of all shrubs and trees, application of weed control and fertilizer on grass, setting of any automatic timers for irrigation/sprinkler system, or the removal of garbage, debris, and animal feces. OWNER must indicate in writing who is to care for the yard, whether it is the TENANT, an independent contractor, or the OWNER themselves. AGENT agrees to inspect the exterior yard during its random property surveys and notify either the tenant or the independent contractor of deficiencies, however, at no time is AGENT responsible for the care of the yard for the PREMISES. If OWNER indicates that the yard care is to be performed by the TENANTS, either the OWNER or independent contractor assumes responsible for yard care between tenancy.

12. LEAD PAINT DISCLOSURE: Housing built before 1978 may contain lead based paint. Lead from paint, paint chips, and dust can pose health hazards if not taken care of properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, landlords and owners must disclose the presence of known lead based paint. (Idaho Code, Section 55-2504)

Owner's Acknowledgement relating to the Property (Initial if Applicable)

- | | | |
|------|---|-----------------------|
| 12.1 | Known lead based paint/hazards are present | _____ |
| 12.2 | Has no knowledge of lead based paint/hazards | _____ <u>MS</u> _____ |
| 12.3 | Has provided lead based/hazard records | _____ |
| 12.4 | Has no records pertaining to lead based paint/hazards | _____ |

13. MANAGEMENT SERVICES DO NOT INCLUDE:

Normal property management does not include monthly inspections, representation at court hearings, depositions, homeowner meetings, providing on-site management, property sales, refinancing, preparing PREMISES for sale or refinancing; supervising and coordinating modernization, rehabilitation, fire or major damage restoration projects; obtaining income tax, accounting or legal advice; advising on proposed new construction, debt collection, and counseling. If OWNER desires AGENT to perform services not included in normal property management or specified above, a fee shall be agreed upon for these services before work begins.

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14. LEGAL FEES

- 14.1 OWNER agrees to pay all expenses incurred by AGENT including, without limitation, attorney's fees for counsel employed to represent AGENT or OWNER in any proceeding or suit involving an alleged violation by the AGENT or OWNER, or both, of any constitutional provision, statute, ordinance, law or regulation of any governmental body pertaining to fair employment, Federal Fair Housing, including, without limitation, those prohibiting or making illegal discrimination on the basis of race, creed, color, religion, or national origin, marital status, or mental or physical handicap in the sale, rental or other disposition or housing or any services rendered in connection therewith, but nothing herein contained shall require the AGENT to employ counsel to represent the OWNER or himself in any such proceeding or suit. (Idaho Code, Sections 12-120 and 12-121)
- 14.2 OWNER shall not hold AGENT liable for any error of judgment or mistake of law except in cases of willful misconduct or gross negligence.
- 14.3 If any legal action or proceeding be brought by either party to enforce any part of this AGREEMENT, the prevailing party shall recover in addition to all other relief, reasonable attorney's fees and costs, but not to exceed \$750 (seven hundred fifty dollars). (Idaho Code, Sections 12-120 and 12-121)

15. INSURANCE: HOLD HARMLESS AND LIABILITY

Nothing in this AGREEMENT contained shall be construed as rendering AGENT liable for any act, omission, or occurrence resulting from or in any manner arising out of the performance of AGENT'S duties and obligations hereunder, or the exercise by AGENT of any of the powers or authority herein or hereafter granted to AGENT by OWNER, or the use of any lease or rental agreement required by OWNER. At all times this AGREEMENT is in effect, OWNER, at OWNER'S expense, must maintain in full force and effect:

- 15.1 Fire and extended coverage for all casualties and hazards customarily covered by casualty insurance in the State of Idaho for the full insurable value of the PREMISES, containing endorsements that contemplate the leasing of the property by OWNER and vacancies between lease terms; and (Idaho Code, Section 41-2401)
- 15.2 Public liability insurance naming AGENT, First Rate Property Management Inc, as additional insured. (Idaho Code, Section 41-2506(1)(a)(i))
- 15.3 Within fifteen (15) days from the effective date, OWNER must provide to AGENT a copy of a certificate of insurance evidencing the required coverage. If the insurance coverage changes in the manner or degree at any time this agreement is in effect, OWNER must provide AGENT a copy of the insurance certificate evidencing any change within ten (10) days of the change. (Idaho Code, Sections 41-1802 and 41-1824)
- 15.4 OWNER agrees to indemnify, defend and hold AGENT harmless from all claims, investigation, and lawsuits by third parties related to the PREMISES, and the management and leasing, whether occurring during the term of this AGREEMENT or after its termination, and from any claim or liability for damage to property, or injuries or death of any person.

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- 15.5 It is expressly agreed and understood that all persons employed in connection with the PREMISES are employees of the OWNER and not the AGENT. The OWNER'S obligation under this Section shall include the payments of all costs, expenses, suits, claims, settlements, judgments, damages, liquidated damages, penalties, forfeitures, back pay, court costs, litigation expense, worker's compensation claims, and attorney's fees.
- 15.6 AGENT shall not be liable for any willful neglect, abuse or damage to the PREMISES by tenants, vandals, or others nor loss or damage to any personal property of OWNER.
- 15.7 If at any time during or after the term of this AGREEMENT, the PREMISES are found to be contaminated with hazardous waste, OWNER agrees to indemnify and hold AGENT harmless from all claims, demands, actions, liabilities, costs expenses, damages and obligation of any nature arising from or as a result of said hazardous waste. The foregoing indemnification shall survive the termination or expiration of the AGREEMENT. (Idaho Code, Section 9-505(2))

16. AGENT'S COMPENSATION AND EXPENSES

- 16.1 AGENT's fee shall be \$ waived monthly or 5 % of the total monthly gross receipts from PREMISES, whichever is the greater amount.
- 16.2 AGENT shall charge a one time set up fee of \$75 per owner.
- 16.3 AGENT will prepare 1099 forms for each PREMISES managed for OWNER for a fee of \$10 per form.
- 16.4 OWNER agrees to reimburse AGENT each month during the term hereof for expenses directly attributable to OWNER's property. These expenses include, but are not limited to, advertising and legal fees.
- 16.5 Any time of AGENT or AGENT's employee(s) expended in preparation for and attendance to court on OWNER'S behalf will be billed at the rate of \$75 for each eviction or \$50 per hour for other litigation. OWNER and AGENT agree such charges will be paid by the OWNER but charged to the TENANT.
- 16.6 Normal property management services do not include showing property to real estate agents, inspectors, appraisers, or prospective buyers while property is for sale. Should OWNER request AGENT to perform services not included in normal property management, a fee based at \$25 per hour may be assessed at AGENTS discretion.
- 16.7 AGENT shall receive and retain all TENANT application fees, non-sufficient fund bank fees, move-out inspection fees, non-payment delivery notice fees, termination fees, and late fees.

17. BINDING EFFECT

- 17.1 This AGREEMENT shall be binding upon the parties hereto and their respective Personal Representatives, heirs, administrators, executors, successors and assigns. OWNER acknowledges receipt of a legible copy of this fully executed AGREEMENT. Effective date is subject to receipt of all items listed on the FRPM Ownership Changeover Checklist.
- 17.2 Should any Section or any part of any Section of this AGREEMENT be rendered void, invalid, or enforceable by any reason by any court of law exercising competent jurisdiction, such a determination shall not render void, invalid, or unenforceable any other Section or any part of any Section in this AGREEMENT.

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- 17.3 AGENT may change the terms under which AGENT is willing to provide service in the future under the AGREEMENT, but only by giving at least 30-days advanced written notice to OWNER.
- 17.4 The drafting, execution and delivery of this AGREEMENT by the parties have been induced by no representations, statements, warranties or agreements other than those expressed in this AGREEMENT. This AGREEMENT embodies the entire understanding of the parties, and there are no further or other agreements or understandings, written or oral, in effect between the parties relating to the subject matter hereof unless expressly referred to in this AGREEMENT.

18. TERMINATION OF AGREEMENT

- 18.1 The OWNER shall be obligated hereunder for an initial term of ONE YEAR from the commencement date set forth in paragraph 2.3 above. In the event the OWNER terminates this AGREEMENT within the initial term, the OWNER agrees to pay to the AGENT an administrative fee equal to the percentage set forth in paragraph 16.1 herein applied to the actual or projected rent for the PREMISES, or the monthly amount set forth in paragraph 16.1, whichever is applicable, for the remainder of the initial term, whether or not the PREMISES is leased or rented.
- 18.2 All provisions of this AGREEMENT that require the OWNER to have insured or to defend, reimburse, or indemnify the AGENT shall survive any termination and, if AGENT is or becomes involved in any proceeding or litigation by reason of having been the OWNER'S AGENT, such provision shall apply as if this AGREEMENT were still in effect.
- 18.3 AGENT may withhold funds for 30 days after the end of the month in which this AGREEMENT is terminated to pay bills previously incurred but not yet invoiced and to close accounts.

19. SPECIAL POWER OF ATTORNEY

KNOWN ALL MEN BY THESE PRESENTS; that the OWNER has made, constituted, and appointed and by these presents do make, constitute and appoint First Rate Property Management, Inc and its agents, true and lawful attorney for and in their name, place and stead, and for their use and benefit as follows: (Idaho Code, Section 15-12-105)

- 19.1 To let, rent and lease on such terms and conditions as said attorney in fact may deem proper and to extend or renew any lease or minimum term tenancy now or hereafter in effect, for such term or terms and at such rents and subject to such covenants, provisions and constitutions as they may deem best for the above described PREMISES.
- 19.2 To ask, demand, collect, and receive all rents and moneys, and to file receipts therefore; to order, direct, superintend, and manage all repairs, alterations, and improvements, and to make disbursements for the same; to make all purchases; in general, to do and perform all acts and things incident to management of the PREMISES and make all proper and necessary disbursements in connection therewith. AGENT shall also have full power to lease said PREMISES as provided herein and to do all acts necessary for the carrying out and execution of such leases or minimum term tenancies. Agent shall have full power to initiate, set up, terminate, or modify any and all utilities or landlord service agreements for all utilities related to the PREMISES, such as but not limited to: electric, gas, water, sewer, trash, and irrigation.

Owner Initials MS

Last Revised: 01.19.10

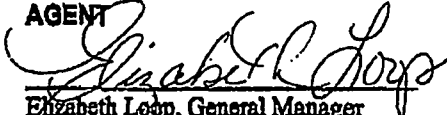
FRPM RENTAL MANAGEMENT AGREEMENT

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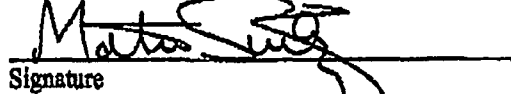
19.3 Giving and granting unto said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the above stated PREMISES, as fully to all intents and purposes as the OWNER might or could do if personally present, and hereby ratifying and conforming all that said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, the parties hereby have affixed or caused to be affixed their respective signatures this 20th day of April, 2010.

AGENT


Elizabeth Loop, General Manager
First Rate Property Management, Inc.

OWNER


Signature

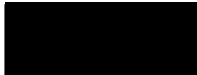
1719 Roosevelt Street
Street Address

Placentia, CA 92870
City, State, & Zip

Home: n/a Cell: 714-307-3959 Work: n/a
Phone Numbers

matt.switzer@bankersfundingcompany.com
mattswitzer@bankersfundingcompany.com

Owner Email address:


Owner Tax ID or SSN

Paula Foy 562-743-7043 and 714-375-9022
Emergency Contact Name and Phone Number

Owner Initials MS

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RENTAL/LEASE AGREEMENT

THIS AGREEMENT, made and entered **APRIL 8TH, 2011**, between First Rate Property Management, Inc., as acting Agent for Owner of the below named property and herein after called "Landlord"; and **ADRA KIPPER** thereafter called "Tenant".

1. **AGENT:** Tenant understands that Landlord is the acting agent of the "Owner". All notices and communications to Owner shall be directed to the attention of First Rate Property Management, Inc, who is the duly authorized agent of the Owner. All notices and communications from Landlord shall be deemed notices and communications from the Owner. This Rental Agreement shall be binding if management of the property is transferred to the Owner or any agent procured by the Owner. **OWNER STATEMENTS:** Agent cannot be held liable for any statements or promises made by Owner if Owner chooses to contact Tenant without Agents knowledge or presence.

2. **IN CONSIDERATION** of the payment of the rentals and the covenants herein contained on the part of the Tenant, Landlord hereby rents and demises to Tenant the following-described Premises, situated in Ada County, Idaho:

Street Address: **1805 E. OVERLAND** Apartment No: **4624**

MERIDIAN, ID. 83642

Parking Spot No: Carport No: Garage No: Mail Box No: J-4

3. **MINIMUM TERM:** Tenant agrees that the minimum term of the Rental Agreement shall be for a period of **12** months, commencing on **APRIL 29TH, 2011**, and terminating on **APRIL 30TH, 2012**. The length of the term is 12 months and 2 days. Should Tenant fail to occupy the Premises for the minimum term for any reason, such shall be breach of the agreement, and Tenant shall be liable for Landlord damages resulting from such breach, such as loss of rent until the unit is re-rented or the completion of the minimum term, whichever is less, advertising costs; reimbursement of any move-in credits given to replacement tenants, utility costs while vacant; yard maintenance costs while vacant, transportation costs to show until re-rented, and other costs and fees as described within this Rental Agreement.

4. **AUTOMATIC LEASE RENEWAL AFTER INITIAL FIXED TERM.** After expiration of the Minimum Lease Term, this Agreement will renew itself for an additional term of the original lease, with a 8 (eight) % increase in monthly rent at the management's discretion. Tenant understands that if Tenant signs a one-year lease, this agreement will automatically renew for another year unless Tenant submits a 30-Day Notice to Vacate 30 days prior to the expiration of the original lease term. All other obligations, terms, and condition here within apply. Month-to-month agreements may only exist by written request and approval in writing by Landlord and must be requested at a minimum of 30-days prior to the end of current lease term. A "month" for purposes of this Agreement means a calendar month. The automatic renewal process will remain in effect throughout the entire term of residency or until a written 30-Day Notice has been delivered to Landlord in accordance to this Rental Agreement.

5. **RENT:** Landlord hereby leases the physical property located at **1805 E. OVERLAND #4624** on **APRIL 29TH, 2011**, for a total of **\$8,507** for the full term of the lease, payable in monthly installments of **SEVEN HUNDRED FIVE** Dollars (**\$705.00**) per month, payable in advance and without demand at the following address:

First Rate Property Management, Inc. 7150 Potomac Drive Boise, ID 83704 208-321-1900

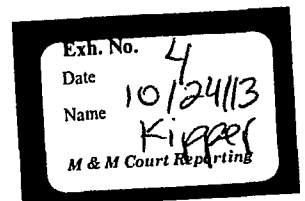
on or before the first day of each month to the Landlord. Post dated checks; CASH, and two and third party checks will not be accepted. If payment is by check, the check must be from one of the Tenant(s) signed on this Rental Agreement.

6. **PayLease Discount:** Tenant agrees to complete all PayLease forms and to utilize PayLease to have rental payments automatically deducted from their checking, savings, credit, or debit card account. PayLease payments must be initiated by the 2nd day of each month to ensure timely payment and processing. Tenant shall receive a monthly rent discount of \$10 for using PayLease. In the event of insufficient funds when rent is charged, the \$10 discount for that month will no longer apply.

7. **PRO-RATED MOVE-IN RENT:** If the initial term of this Rental Agreement commences other than on the first day of a calendar month, Tenant's rent shall be a pro-rated portion of a full month's rental, calculated on a daily (365 day year) basis from the commencement date until the first day of the following calendar month, and shall be payable in advance. First month's pro-rated rent calculations are as follows:

Monthly Rent Amount	# of days to occupy this month	Pro-Rated Rent
\$705	2	\$47

8. **PRO-RATED MOVE-OUT RENT:** Tenant is responsible for rent up to the 30th day of their 30-Day Notice to Vacate. Failure to do so will result in late fees. (e.g. Tenant gives Notice to Vacate on the 10th of November; tenant is responsible for all of November's rent and 10 days in December. If the 10-days of pro-rated rent are not paid on or before December 1st, late fees will be applied).



The following Tenant initials acknowledges receipt and review of this page: [Signature]
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CONFIDENTIAL

000187FR06145

Rental/Lease Agreement dated **APRIL 8th, 2011**, for Premises located at **1805 E. OVERLAND #4624 MERIDIAN, Id. 83642**
With Tenant, **ADRA KIPPER**

9. **LATE RENTS AND FEES:** Rent is past due on the 5th day of each month. If rent has not been received by 5:00 PM on the 5th day of the month (no exceptions for weekends, holidays, or postage delays), it is considered late and Tenant will be charged and agrees to pay a late fee of \$50.00 plus \$10.00 per day thereafter; until rent is paid in full.

10. **SITE UNSEEN:** Parties agree that Tenant's were given the opportunity to inspect the property prior to signing the Rental Agreement. If Tenant's declined to do so and chose to sign the Rental Agreement on subject property sight unseen for their convenience, parties acknowledge that Tenant's will be fully obligated to the signed Rental Agreement should they not take occupancy of the Premises. Tenant does agree that any maintenance shall be done as required by the Rental Agreement and not the preferences of the tenant since Tenant's agreed to take property sight unseen.

11. **RETURNED CHECKS.** A \$25.00 charge will be assessed for returned checks. Rent is not considered paid or received until Tenant's check clears the bank; therefore late fees will apply until funds are received. After the second occurrence, rent and other payments will be required to be paid with guaranteed funds such as a cashiers check or money order.

12. **MOVE-IN CREDITS.** Tenant agrees that if Landlord gave Tenant a move-in rent credit or discount, that Tenant is responsible for the repayment of the rent credit or discount if Tenant fails to fulfill initial term of the Rental Agreement.

13. **OCCUPANCY.** The Premises are to be occupied as living quarters for no more than adults **1** and **2** occupants under the age of 18. Only those adults specifically named above may occupy and use the property. Tenant agrees to notify Landlord in writing of any extended vacations or absences from the Premises as to the dates Tenant shall be absent. Tenant further agrees to request in writing the authorization for other persons to occupy the Premises while Tenant is absent. **Occupancy by anyone other than those named above for more than 10 nights shall constitute a breach of the Rental Agreement, unless, prior consent is obtained in writing by Landlord.**

14. **DEPOSIT AMOUNTS:**

Security, Cleaning, Damage, and Rent Deposit:

\$FIVE HUNDRED FIFTY (\$550.00)

Cable Deposit

\$ (\$)

Double Deposit

\$ (\$)

Total Deposits Collected:

\$FIVE HUNDRED FIFTY (\$550.00)

15. **DEPOSITS:** The tenant(s) shall deposit with Landlord as a Security/Cleaning/Pet/Damage deposit, the sum of **FIVE HUNDRED FIFTY Dollars (\$550.00)**, payable prior to occupancy by means of secured funds. Of the non-security deposit portion of the deposit; the sum of **\$50.00** is non refundable and is specifically deducted for professional services rendered by First Rate Property Management, Inc. for the duration of this tenancy. Cash or personal checks will not be accepted as payment for a security deposit. Tenant cannot use the security deposit during the occupancy, or term of the Rental Agreement for rent. Rent must be paid in full during occupancy and lease of the property. The Landlord shall furnish, no later than 30 (thirty) days after the Tenant has vacated the Premises, an itemized statement for the security deposit. Landlord may use/deduct security deposit funds for the damage, cleaning, legal expenses, costs of collection, loss of personal property of Landlord included in this Rental Agreement, loss of rents, late fees, service fees, non-sufficient fund fees, tenant caused billing, photographs of damage, pest control, change of locks if keys issued are not returned or if Tenant provides an unauthorized person with any key to the property, termination fees, and re-rent fees. Tenant understands that the security deposit will only be refunded when the property is completely vacated and all of Tenant's personal property has been removed. Any refund from the security deposit will be made payable to all current Tenants as shown on the Rental Agreement. Should Owner change management companies or sale the property, Tenant authorizes Landlord to assign this Agreement to the new owner or Management Company and release any deposits or other Tenant related funds to the new Owner or Management Company, less any fees owed to Landlord as described within this Agreement and hold Landlord harmless from that assignment date and forward. If Tenant has made a security deposit with a prior owner or property manager other than Landlord and the deposit has not been transferred to the current owner or Landlord, the Tenant understands that any refund of the deposit must be pursued directly from the prior owner or property manager and that Landlord shall have no responsibility for the same. (*Idaho Code, Section 6-321*)

16. **DISCLOSURE OF INFORMATION.** Tenant may from time to time authorize Landlord to disclose information regarding this Agreement and the tenancy to third-parties, including, but not limited to, future Landlords and mortgage lenders. Landlord will not provide this information if Tenant's lease expiration date is greater than 90 days from the time this information is requested and reserves the right to charge a reasonable fee to the receiving party for providing such disclosure. Tenant understands that the receiving party may impose any such charges incurred back upon the tenant.

17. **TERMINATION FEE. (Re-Rent Fee)** A Termination fee of Five Hundred Dollars (\$500) will be charged to all Tenants who have not completed their full lease term, or who do not give proper thirty (30) days written notice. This fee is in addition to all other fees described within this Rental Agreement to include all lost rents. If tenant supplies Landlord with a new qualified tenant to take over this rental agreement, there will be a Lease Takeover Fee of Two Hundred and Fifty Dollars (\$250). If there is a change of roommates on this lease agreement there will be a Roommate Adjustment Fee of Twenty Five Dollars (\$25) per roommate. All termination fees must be paid in full to the Landlord upon written demand by the Landlord to the Tenant

The following Tenant initials acknowledges receipt and review of this page:
Last Revised: 02.25.2011

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Rental/Lease Agreement dated APRIL 8th, 2011, for Premises located at 1805 E. OVERLAND #4624 MERIDIAN, Id. 83642
With Tenant, ADRA KIPPER

18. **INCARCERATION, DEATH OR INCAPACITY OF TENANT:** In the event of the incarceration or death of the Tenant, if the affected Tenant is the sole Tenant, this Lease shall terminate. In the event of the incapacity, incompetency or inability to care for himself or herself of the sole Tenant, or the primary wage earner if there are multiple Tenants, a reasonable accommodation request may be submitted and if approved, this Lease shall terminate with a 30 day notice. In any of the foregoing circumstances, the Tenant hereby authorizes the following person to enter the premises and remove the Tenant's personal property. In the event of a death, the Tenant's duly appointed Personal Representative (executor) shall also have such authority. (Idaho Code, Sections 15-3-711 and 15-12-204(5))

Name:

Adra Shunee Kipper Address: 9368 W. Heathside Dr

City:

Boise State: ID Zip: 83709 Cell Ph: 208880-8632 Home Ph: Work Ph:

19. **USE OF PREMISES.** Premises shall be used as a residence only. Operating a business from this property is prohibited. The number of occupants is not to exceed the number of persons shown on the application. For purposes of this Rental Agreement, occupancy shall be defined as residing in the apartment three (3) days or more in any one-week period. Tenant shall not violate any governmental law in the use of the Premises, commit, waste, or nuisance, annoy, molest, or interfere with any other tenant or neighbor, and the Conditions, Covenants and Regulation (CC&R's).

20. **MULTIPLE RESIDENTS OR OCCUPANTS.** Each Tenant (and each Tenant's share of the security deposit) is jointly and severally liable for all lease obligations. Violation of the Rental Agreement or rules by any Tenant, guest or occupant shall be considered a violation by all Tenants. Requests and notices from any Tenant or occupant (including notice of lease termination, repair requests, and entry permissions) shall be deemed from all Tenants. In eviction cases, or for any other purposes of providing notice, anyone of the multiple tenants shall be considered the agent of all other tenants in the Premises for the purposes of providing notices and service of judicial process. Security deposit refunds may be made in one check jointly payable to all Tenants; and such check and any deduction itemizations may be mailed to one Tenant only.

21. **JOINT AND SEVERAL OBLIGATIONS.** Each Tenant under this Rental Agreement is jointly and severally individually liable to the Landlord for the total rent due and damages inflicted upon the leased Premises whether or not Tenant continues to physically occupy the Premises. **TENANTS** with roommates agree to pay the monthly rent in the form of **ONE** check for the total amount of the rent each month.

22. **PERSONAL PROPERTY.** All personal property now upon the Premises shall remain at the termination of this rental. Tenant acknowledges that the below checked appliances have been furnished and are in good working condition and are to remain in the rental upon termination: ☒ refrigerator ☒ washer ☒ dryer. For safety reasons, Tenant agrees to turn off and not operate washers, dryers, ovens, and stoves, while absent from the Premises.

23. **ASSIGNMENT, SUBLETTING, REPLACEMENTS.** The undersigned Tenant agrees and understands they are not to sublet any portion of the Premises in which they have entered into agreement under the terms of this Rental Agreement. If the Tenant wishes to have another person (s) reside in the Premises, or replace one of the Tenants, Tenant(s) must abide by the following: (1) **Tenants must first contact Landlord and submit in writing any requests for another person(s) to reside in the Premises.** If the person(s) desired is eighteen (18) years of age or older, they must complete a Rental Application and complete the processing of the application. (2) **The Tenant must abide by the decision of the Landlord whether another person(s) can be added to the Rental Agreement.** (3) **If Landlord approves the person(s), a fee of \$25 must be paid in advance and the Landlord (at Landlord's option) may require that this Rental Agreement be signed by the proposed Tenant with or without an increase in the total security deposit or Landlord may require that an entirely new Rental Agreement be signed by the remaining and replacement Tenant.** Unless Landlord agrees otherwise in writing, any departing Tenant's interest in the security deposit will automatically transfer to the replacement Tenant as of the date of the Landlord's approval; and the departing Tenant(s) shall no longer have any refund rights to the security deposit. The departing Tenant will not be released from liability for remaining term of this Rental Agreement unless Landlord agrees in writing. If the departing Tenant is not released, such Tenant's liability for future rentals will be reduced by the amount of rentals actually received from such replacement. (4) **The original Move-In Inspection Form of this Rental Agreement will prevail.**

24. **UTILITIES:** Tenant shall pay for all utilities such as water, sewer, trash, electric, gas, cable, telephone, or any other services desired by Tenant except for **WATER, SEWER, TRASH & YARDCARE**, which are paid for by Landlord. All other utilities, other than those specifically listed, are to be paid in full by the Tenant. Tenant agrees to place utilities in Tenant's name prior to occupancy of Premises and continue until the termination date, as evidenced by the proper thirty (30) days written notice. Tenant has an obligation to notify Landlord prior to any interruption of utility service to the Premises. Any damage or loss incurred due to Tenant's negligence to pay utility, abandonment, or failure to provide heat when exterior temperatures fall near freezing, or to inform Landlord of shut off shall be at Tenant's Expense. Tenant further agrees to work directly with the appropriate utility company and to hold the Landlord harmless for charges incurred by Tenant. Landlord may from time to time require Tenant to pay for utility(s) directly to Landlord in addition to the rent payment. In the event utilities are furnished by the Landlord, Tenant agrees to exercise diligence in conserving said utilities, specifically water, heat and electricity. No keys will be issued to Tenant until the appropriate services are put in Tenant's name and verified by Landlord.

The following Tenant initials acknowledges receipt and review of this page: Adra

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25. **KEYS AND CONTROLS.** The LANDLORD is to retain keys to the property. If the Tenant does not furnish all of the issued keys and controls upon vacancy, the Tenant agrees to pay the cost of re-keying the Premises and the replacement cost of all controls. The Tenant upon occupancy has been given the following keys and controls:

Front Door Keys	2	Back Door Keys		Garage Door Keys		Storage Door Keys	
Mail Box Keys	1	Pool Keys		Garage Remotes		Laundry Room Keys	
Parking Permits							

26. **KEYS AND CONTROLS (Continued):** Tenant will be charged rent until all keys and controls, as listed above, are surrendered directly to Landlord. Tenants are not to leave keys in Premises. (e.g. Tenant gave notice to vacate on November 10th. Tenant paid all of November's rent and 10 days of pro-rated December rent, but did not turn in the keys until December 15th. Tenant will be responsible for 5 additional days of December's pro-rated rent plus late fees). Tenant agrees to lock all doors and windows during Tenant's absence from the Premises. Except under instruction from Landlord or Power Company, tenant is not permitted to remove fuses or flip breakers into the "OFF" position.

27. **PARKING:** All parking is reserved for Tenant use only. If parking is assigned, Tenant agrees not to park in any area other than Tenant's assigned parking spot or carport number. Any parking in designated fire or no parking zones or parking in a stall not assigned to Tenant shall result in a parking violation fee, and/or towing of the vehicle at Tenant's expense. Vehicle and engine repairs, no matter how minor, are not allowed on the Premises. Tenant agrees and understands that they are responsible for ensuring that their guests park outside the parking area and that Tenant's guest understand that their car may be towed if parked on the Premises. Tenant agrees to notify Landlord of any illegal or unauthorized vehicles. If parking availability permits, Tenant(s) are limited to two vehicles on the Premises (to include garages, carports, parking lots, and driveways). All other vehicles, tenant or guest owned, must be parked off the Premises. *All Residents and Guests are prohibited from backing any vehicles into any parking spaces as well and covering any portion of any sidewalk with any part or portion of a vehicle. The only exception will be made during times when a tenant is moving in or out of the premises.* All Residents residing within the Grayling Place Complex hereby acknowledge, understand, and agree that FRPM does not manage the homeowners association and that any vehicle not parked in its assigned parking spot with the official Grayling Parking Permit clearly displayed will be towed at Tenant's expense. If Tenants parking pass is lost or stolen, tenant shall be responsible for contacting the HOA, Austin Property Management, 1310 Vista Ave., Ste 3, Boise, Idaho 83705, 208-336-5927 and purchasing a new parking pass. If Tenants parking pass gets damaged or broken, Austin Property Management will replace it for free, but Tenant is responsible for taking all of the broken pieces to Austin Property Managements office to get a replacement pass.

28. **BOATS/TRAILERS.** Storage of boats, trailers/RVs, vehicles exceeding one ton, or any other vehicles other than those listed below is prohibited.

29. **PARKING LOT SPEEDS.** If property has a parking lot, TENANT agrees to operate any motorized or non-motorized vehicle at a maximum speed of ten (10) miles per hour.

30. **VEHICLES.** Tenant shall not perform in any business connected with vehicles on the property. Vehicles of any kind should not be parked on any area other than the driveway, designated RV access, if applicable, or the street. Vehicles leaking oil or gasoline are to be removed from the Premises until repaired. Vehicles in obvious disrepair, inoperative, unregistered or expired registration, are not to be parked on or in front of the property and will be towed at Tenant's expense. The below vehicles are authorized on the Premises. Tenant understands and agrees to submit in writing all change in vehicles or vehicle description to Landlord within five (5) days of the addition or change. For the purposes of this Rental Agreement, the term vehicle is understood to include standard passenger vehicles, registered and street legal motorcycles, pickup trucks, and small vans. Parking is limited to these classes of road vehicles. Vehicle washing is not allowed on the Premises, except when Tenant is responsible for the payment of the water bill.

Year	Make	Model	Color	License Plate No.
2010	MAZDA	3	RED	2C-6A-009

31. **LOST OR STOLEN PROPERTY.** Landlord shall not be responsible for any of the Tenant's property lost or stolen either from Tenant's rented Premises or from any parking, storage, or common area in or about the building or Premises, and Tenant assumes all responsibility for the security and safekeeping any such property.

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32. **PETS.** Tenant shall not have any mammals, reptiles, birds, rodents, or pet of any nature on or about the Premises with the exception of:

Breed	Age	Weight	Sex	Name
NO PETS!	NO PETS!	NO PETS!	NO PETS!	NO PETS!
NO PETS!	NO PETS!	NO PETS!	NO PETS!	NO PETS!

This also includes animals, birds or pets of any nature of any guests, relatives, or invited parties to the Premises. There is to be "no baby-sitting or care taking" of any other person(s) animals, birds, or pets of any nature. Feeding stray or unauthorized pets is prohibited. If the Rental Agreement excluded pets, the Tenant agrees to pay, retroactive to the beginning of the tenancy, \$100 per month per pet for unauthorized pets and held responsible for the conditions stated below.

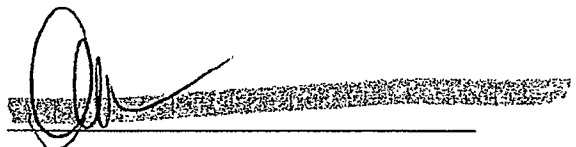
Tenant acknowledges and agrees to this paragraph. If any pet is listed above, Tenant agrees to pay any additional non-refundable fee of \$N/A per pet upon approval and prior to pet occupancy. Tenant understands any additional funds paid are fees and NOT a pet deposit. Tenant assumes all financial responsibility for damaged caused by said pet. "**Pet Rent**" is to be paid in addition to normal rent for all authorized pets. This amount varies from each property and property owner. There is no additional fee or Pet Rent required for support or companion animals. Tenant agrees to the below conditions in consideration of the authorization of the pet, support animal, or companion animal, to occupy the Premises.

1. Tenant agrees to keep said pet, or support or companion animal under control at all times and obey all city ordinances related to the keeping animals as well as any and all condominium and/or subdivision rules which may apply.
2. Tenant agrees that Landlord may revoke permission to keep said pet on Premises by giving Tenant written thirty (30) days notice.
3. If the pet is a cat, the cat must be neutered and declawed (support or companion animals are exempt from this condition). Tenant must provide and maintain an appropriate litter box.
4. If the pet is a bird, the bird shall not be let out of the cage.
5. No animal shall be fed on unprotected carpeting within the Premises. Tenant shall prevent any fleas or other infestation of the Premises or other property of Landlord.
6. If in the opinion of Landlord the pet becomes annoying, bothersome or in any way a nuisance to other Tenants or to the operation of the community, Tenant will immediately, upon notice from Landlord, remove the pet, from the Premises.
7. Permission to keep animal(s) is restricted only to the particular animals(s) described above and does not extend to any other animals.
8. In multi-family dwellings, animals must be kept in Premises, on a leash, or carried at all times. Animals will not be allowed to run loose on grounds or other common areas.
9. Landlord shall not be liable for any damages to person or property caused by Tenant's animal(s) and Tenant hereby agrees to hold agent harmless from such liability, assuming the same liability themselves.
10. All pets must be properly licensed and inoculated for rabies and all other usual inoculations for that type of pet.
11. Fish and/or amphibians are the only pets that do not require "Pet Rent" or "Pet Fees". Fish tanks 30 gallons or larger require Renters Insurance that includes water damage coverage.
12. Tenant agrees to be fully responsible for any damage caused to the property by the animal(s) and for any and all wear and tear resulting from the animal(s) and agrees to fully compensate the Landlord for any and all such damage or additional wear and tear including but not limited to:
 - a. Cleaning up of ALL droppings deposited in the yard by the animal(s) immediately following each incident.
 - b. Filling in any holes in the yard and re-sodding as necessary to restore the yard and lawn to original condition.
 - c. Replacing doors, screens, windows, window coverings, or any other items scratched, torn, damaged or soiled by the animal(s).
 - d. Additional cleaning or replacement at the discretion of the Landlord of any carpeting that has been damaged, soiled or stained or which has an odor as a result of the animal(s).
 - e. Deodorizing and disinfecting any floor or wall or other surfaces with may be stained or have an odor as a result of the animal(s).

33. **PET REMOVAL.** Landlord may remove an unauthorized pet if one day's prior written notice of intent to remove the pet is left in a conspicuous place on the apartment and Landlord may present the pet over to a humane society or local authority.

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34. **ENTRY AND INSPECTION.** Landlord has the right to enter the Premises and Tenant agrees not to unreasonably withhold from the Landlord consent to exhibit the Premises to prospective tenants, workmen, contractors, purchasers, insurance agents, real-estate agents, and to inspect the Premises with a minimum of twelve (12) hour notice. During the last thirty (30) days of occupancy, Tenant authorizes Landlord to inspect the property and place a FOR RENT sign on the property and to show property to prospective tenants. For each occasion where the access rights described above are denied by the Tenant, Tenant shall pay Landlord the sum of \$50 (fifty dollars) as liquidated damages; it being acknowledged that Landlord shall be damaged by the denial of access, that Landlord's actual damages are hard to estimate, and that this fee is a reasonable pre-estimate and not a penalty.

35. **OUTSIDE MAINTENANCE.** Tenant agrees to keep sidewalks and driveways free of ice, snow, and debris, and in safe condition in accordance to city ordinance. Tenant shall not litter. All cigarette butts must be placed in a proper container and properly disposed of. Tenant agrees to pickup trash and debris that blows onto or appears on the Premises, no matter the source. Tenant is required to keep yard area free of debris, and to report problems to the Landlord.

36. **TRASH AND CONTAINERS.** Tenant agrees not to allow trash or other materials to accumulate which will cause a hazard, violation of any health, fire or safety ordinance or regulation, or is a visual nuisance. Tenant shall place all garbage inside containers with lids. Items too large to fit in the trash shall not be placed in or near the container and Tenant agrees to remove these items from the Premises immediately at Tenant's expense. If the trash removal company refuses to remove any portion of Tenant's garbage, Tenant agrees to remove it from the property immediately at Tenant's expense.

37. **POOL/SPA MAINTENANCE:**

N/A Tenant is responsible for the care and service of the pool, spa/hot tub even if they choose not to use it. Tenant responsibilities include, but not limited to: maintaining proper water level, weekly testing and adjusting for proper chemical balance, weekly cleaning of pool and/or spa/hot tub, weekly cleaning of filters and replacement of filters as necessary, proper cleaning and maintenance of covers, ensuring proper power and heating to keep from freezing, and draining as required.

N/A The Landlord provides pool/spa service. Tenant is required to maintain level of water and report any problems.

X The Homeowner's Association provides pool/spa service. Tenant is required to report any problems.

38. **YARD MAINTENANCE.** Tenant understands that at all times Tenant is responsible for keeping all outside areas free of garbage, debris, animal feces, and or any other unsightly item. Tenant shall not install any plants, trees, flowers, or shrubs without prior written approval from Landlord. Any unauthorized installation will be considered damage and tenant agrees to pay for the removal of such plantings and the cost to restore the affected areas to the original condition.

N/A TENANT is responsible for maintenance of all landscape. This includes: weeding of planters, trimming and edging of grass and planters, pruning and trimming of all shrubs and trees, application of weed control and fertilizer on grass, setting of automatic timers for irrigation/sprinkler system, and report problems to Landlord. If Tenant does not care for landscape as required and disregards Landlord's notice to correct, Landlord reserves the right to contract yard maintenance and the Tenant will incur the cost of the landscape maintenance. Tenant agrees that the yard has been mowed within seven (7) days of occupancy and that grounds are in good condition. The Tenant further agrees to deliver the property, at the end of this tenancy, grass that is weed free, mowed, trimmed, edged and properly watered as well as trees and shrubs that have been trimmed and pruned, and planter areas free of weeds.

N/A Landlord is responsible for maintenance of front landscape. Tenant is required to water the landscape, setting of automatic timers for irrigation/sprinkler system and reporting problems to Landlord.

X Landlord is responsible for maintenance of entire yard to include watering.

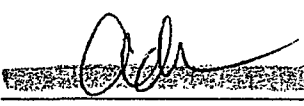
39. **REPAIRS AND MALFUNCTIONS.** All service or repairs, which fall within the responsibility of the Landlord, shall be requested in writing. Tenant shall not make repairs or hire contractors to make repairs. Landlord shall respond to the emergency maintenance request as soon as possible. For the purposes of this Rental Agreement, emergency maintenance is fire, flood, and uncontrollable water, backed up sewer, electrical problem endangering life, or smell of gas. Tenant is directed to call 911 for emergencies causing immediate danger such as fire. Non-emergency requests will be scheduled and responded to within one week of notification. If Tenant has not been contacted by a contractor within three days, Tenant agrees to contact Landlord immediately. Tenant acknowledges that maintenance repairs are commonly contracted out and are not employees of Landlord (First Rate Property Management, Inc) and will not hold Landlord responsible if Tenant has not contacted Landlord when contractor fails to communicate or does not keep committed appointment. Tenant agrees to attempt to remedy the below maintenance issues prior to notifying Landlord:

1. **Smoke Detector won't work when tested:** Test with approved smoke detector smoke spray, replace battery.
2. **Smoke Detector beeps:** Replace battery, check for proper wire termination connection
3. **No power to plugs or switches:** Check and reset breaker panel or replace blown fuses. Check and reset all GFI outlets (located in kitchen, bathrooms, utility rooms, and garages). Check if plug works off a wall switch.
4. **Garbage disposal doesn't work:** When on, do you hear a buzz? If you do not hear a buzz, hit the reset button on the bottom of the disposal and test. If you hear a buzz, turn off disposal and unplug from wall. Place a 3/4 inch allen wrench in the center shaft and twist back and forth (this unjams the disposal). Remove the object, turn back on, and test. Repeat until the object is removed.
5. **No hot water:** Check thermostat on tank for proper temperature setting. Check that thermostat is not set to "vacation". Check and reset breaker in power panel. Check and reset button next to thermostat.
6. **Hot water is too hot:** Check thermostat on tank and turn down.
7. **Plumbing or fixtures leak:** Turn off water fixture, turn off water at supply line and notify Landlord immediately
8. **Toilet is plugged:** Plunge and test. Repeat as needed.

The following Tenant initials acknowledges receipt and review of this page:
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9. **No heat:** Check thermostat. Check that furnace covers are in properly. Check that a switch that looks like an ordinary light switch is turned on (located in or near the furnace room). Did you pay or disconnect the utility?
 10. **Dishwasher won't drain:** Clean food out of bottom of dishwasher.
 11. **Dishwasher doesn't clean dishes:** Don't run garbage disposal while D/W is running. Do not use liquid or gel detergents. Run D/W without any soap through several cycles. Clean out the bottom of D/W. Pre-wash your dishes.
 12. **Dishwasher grinds or no water is coming in.** Turn off, if no water on the bottom pour two large glasses of water into the bottom and re-start. Run the dishwasher with no soap to clean out any remaining soap that could be blocking pump. If problem continues, call Landlord and discontinue use.
 13. **Refrigerator too warm or too cold:** Check thermostat in refrigerator is set correctly.
 14. **Water drips from freezer to refrigerator compartment.** Remove all food and store in a cooler. Turn off refrigerator and allow defrosting. Turn refrigerator back on and replace food.
 15. **No Air Conditioning:** Check all circuit breakers. Clean and replace filter and test. Tenants will be charged for A/C repairs caused by dirty or missing filters.
40. **DESTRUCTION:** During Tenant occupancy of the Premises, Landlord shall have the risk of loss to the Premises (but not Tenant's property therein) resulting from fire, windstorm, hail, lightning, or like casualty, and in the event of damage or destruction from such cause, Landlord shall, at Landlord's option, repair or replace the same, or declare this Rental Agreement terminated as of the date of such loss or destruction. Should Landlord fail to promptly repair or replace any such loss of destruction, Tenant may at Tenant's option declare this Rental Agreement terminated. All rentals due from Tenant during any period the Premises are rendered untenable by reasons of such loss or destruction shall be abated.
41. **ACCESS FOR REPAIRS:** Tenant hereby agrees, requests, and authorizes Landlord to allow maintenance contractors and personnel to check out a key from Landlord with the sole purpose to gain access to the property to make necessary repairs during normal business hours unless otherwise agreed upon with Tenant and contractor. Tenant further agrees that when Tenant contacts Landlord and requests repairs, at that time Tenant received proper and sufficient notice that Landlord shall gain access to the property to make the necessary repair via a pass key.
42. **SMOKE DETECTORS:** Tenant and Landlord agree that all smoke detectors are in working order, and henceforth Tenant agrees to keep electricity provided to the smoke and fire detectors either through battery or Idaho Power. Tenant acknowledges and agrees to locate the smoke detectors in the property. Tenant agrees to test the detector within five (5) days of move in and again at least once a week. If the detector is battery powered, Tenant agrees to replace the battery as needed. If, after replacing the battery, the smoke detector does not work, Tenant agrees to inform the Landlord immediately of any malfunction. Upon termination of this tenancy, Landlord will replace all expired or missing smoke detector batteries or detectors at Tenant's expense. (*Idaho Code, Section 6-320(6)*)
43. **TENANT RESPONSIBILITY TO CARE AND MAINTAIN PREMISES.** Tenant shall be responsible for the following:
- a. Keeping the property clean and sanitary inside and out and in good order and condition and shall not mar or deface the walls, woodwork, or any part of the Premises.
 - b. Reporting to Landlord items needing repair.
 - c. Pay for damage to Property as a result of failure to report a problem in a timely manner.
 - d. Pay Landlord upon demand for costs to repair, replace or rebuild any portion of the Premises damaged, whether through act of negligence, by Tenant, Tenant's guests, or invitees.
 - e. In the event of a "break in", supply Landlord with a copy of the police report at Tenant's expense; should Tenant fail to do so, Tenant agrees to pay repair costs.
 - f. Replacing any broken or cracked glass, no matter what the circumstances of breakage, unless police report is provided to Landlord detailing circumstances of breakage.
 - g. Payment of unnecessary workman service calls, for service calls caused by Tenant's negligence, and for extra service call as a result of failure to keep appointments with repairman.
 - h. Be responsible for damage done by rain or wind as a result of leaving windows or doors open.
 - i. Maintaining minor and simple repairs such as replacing light bulbs, smoke detector batteries, cleaning or replacing furnace filters every month. Under no circumstances is Tenant to perform any electrical repairs.
 - j. Carpet cleaning when it becomes soiled during tenancy.
 - k. Maintaining normal insect and rodent control.
 - l. Refrain from disposing things such as diapers, sanitary napkins, tampons, paper towels, wads of toilet paper, newspaper, toys, matches, Q-tips, balls of hair, grease, oil, table scraps, clothing, rags, sand, dirt, or rocks. Tenant agrees to pay for cleaning the drains of any and all stoppages, except incidents created by roots or structural defects.
 - m. Clearing blockages of garbage disposal not caused by mechanical failure.
 - n. Routine cleaning of window coverings.
 - o. Remove and properly store all holiday decorations within five (5) business days of the holiday.
 - p. Remove garden hoses from exterior hose-bibs/water spickets and ensure they are completely turned off.

The following Tenant initials acknowledges receipt and review of this page: 
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44. **NORMAL WEAR AND TEAR DEFINED:** According to Idaho State Law, Normal Wear and Tear means the deterioration that occurs based upon the use for which the rental unit is intended and without negligence, carelessness, accident, misuse, or abuse of the premises or contents by the tenants, their family, or their guests. For the purposes of this agreement, FRPM DOES NOT consider the following items as normal wear and tear. (Mollies/screws installed in walls or more than 5 nail holes per wall, carpet cleaning, extreme traffic wear of carpet, torn, burned, or stained carpet, pet deodorizer, general cleaning, blind cleaning/repair/replacement, window cleaning, replacement of expired light bulbs, replacement of smoke detector batteries, repainting due to smoke/candle damage, broken toilet tanks, replacement of furnace filters, or ripped or marked wallpaper. (Idaho Code, Section 6-321)

45. **MOISTURE ACCUMULATION.** Tenant shall remove any visible moisture accumulation in or on the Premises, including all walls, windows, floors, ceilings, and bathroom fixtures; mop up spills and thoroughly dry affected area as soon as possible after occurrence: use exhaust fans in kitchen and bathroom when utilizing any fixture or object that produces steam; and keep climate and moisture in the Premises at reasonable levels.

46. **NOTIFICATION TO MANAGEMENT OF MOISTURE.** Tenant shall promptly notify management in writing of the presence of the following conditions: (1) a water leak, excessive moisture, or standing water inside the Premises (2) A water leak, excessive moisture, or standing water in any community common area (3) Mold growth in or on the Premises that persists after tenant has tried several times to remove it with a bleach and water solution. (4) A malfunction in any parts of the heating, air-conditioning, or ventilation system in the Premises, and (5) Any electrical problems.

47. **LOCK OUTS.** Tenant agrees to pay a \$40.00 lock out fee should Tenant lock himself/herself out and request to be let back into the rental unit.

48. **LEAD PAINT** ~~(N/A)~~ The property was built after January 1, 1978 and does not require a lead based paint addendum.

N/A The property was built prior to 1978 and Tenant is hereby notified that such property may present exposure to lead from lead-based paint that place young children at risk of developing lead poisoning. The Landlord has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

N/A Tenant acknowledgement – Tenant has received the pamphlet *Protect Your Family from Lead in your Home*.

49. **NOTICE.** Notice can be served on Landlord or any address designated by Landlord. Notice begins on the day notice is received by Landlord and must be in writing. Tenant must obtain the 30-Day Notice to Vacate form from LANDLORD, complete and submit said form to Landlord. Verbal notices are not accepted or honored. Tenant can give notice by postal service or personal delivery. Except as prohibited by law, or as set forth in paragraph 3 herein, either party may cancel the Rental Agreement by service upon the other, with a written thirty (30) day Notice of termination of Tenancy. Therefore, a thirty (30) Day Notice to Vacate can be given by either party on or after APRIL 1ST, 2012. Notice to retract a prior written notice to vacate must be submitted in writing. Tenant understands and agrees that Tenant is responsible for all advertising costs and any other costs associated with the retraction of their notice. (Idaho Code, Sections 6-303(1) and 6-304)

50. **HOLDOVER WITHOUT PENALTY.** Tenant may holdover (extend) beyond the termination of the 30-day notice to vacate given by Tenant to Landlord without penalty if: (1) Tenant in writing requests to withdraw the original Tenant's 30-day notice to vacate, (2) Landlord agrees and authorizes the holdover period, and (3) Tenant obtains a new 30-Day Notice to Vacate form from Landlord, complete and submit said form to Landlord with new move out date. Tenant agrees to pay holdover rents in advance. (Idaho Code, Section 6-304) (e.g. Tenant gave notice to vacate on November 10th to be moved out by December 7th, but needed 5 more days to move. Tenant received authorization to holdover and in writing withdrew original notice and completed a new 30-Day Notice to Vacate form, showing a move out date of December 12th. On or before the December 1st, tenant must pay 12 days of pro-rated December rent or will be charged late fees.).

51. **HOLDOVER WITH PENALTY.** If Tenant holdovers (extends) beyond the end of the Rental Agreement term or after proper 30-days notice to vacate has been given, or beyond a different move-out date agreed to by the parties in writing, and Landlord does not authorize the holdover, rent for the holdover period shall be increased by 25% of the then-existing rental; and at Landlord's option, Landlord may extend the lease term for up to one month from date of notice of lease extension by delivering written notice to Tenant or Premises while Tenant is still holding over. Holdover rents shall be due in advance and delinquent without notice or demand. Additionally, Tenant will be held responsible for the reimbursement all advertising expenses incurred by Landlord to secure a replacement tenant, which was negated by the current tenant's unauthorized holdover.

52. **EARLY DEPARTURE:** If Tenant vacates prior to the 30th day of the notice to vacate, tenant may notify Landlord and surrender all keys. Tenant understands that he/she is still responsible for rent and utilities until the 30th day of the notice to vacate. It shall be the Landlord's responsibility to put forth reasonable effort to prepare and re-rent the Premises. Landlord agrees to pro-rate rent back to Tenant any rental funds collected from the new Tenants.

53. **BREACH OF CONTRACT.** In the event the Tenant moves out prior to the end of the Rental Agreement, or is evicted due to a violation of the Rental Agreement, Tenant agrees to reimburse Landlord for all costs incurred as a result of the breach. These costs may include, but are not limited to attorney's fees and lost rents, reimbursement of any move-in credits to replacement tenants, damage, cleaning, costs of collection, loss of personal property of Landlord included in this Rental Agreement, service fees, non-sufficient fund fees, tenant caused billing, photographs of damage, pest control, change of locks if keys issued are not returned or if tenant provides an unauthorized person with any key to the property, termination fees, and re-rent fees. (Idaho Code, Section 6-324)

The following Tenant initials acknowledges receipt and review of this page:
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Rental/Lease Agreement dated APRIL 8th, 2011, for Premises located at 1805 E. OVERLAND #4624 MERIDIAN, Id. 83642 With Tenant, ADRA KIPPER

54. **BREACH WITHIN LEASE PERIOD.** In the event the Tenant breaches this Rental Agreement by failing to occupy the Premises, by moving out, or by failing to pay rents required in the Rental Agreement, the Landlord may withhold from any funds paid by Tenant the costs of re-renting the Premises, including, but not limited to, lost rents, reimbursement of any move-in credits to replacement tenants, advertising fees, utilities and Termination Fee (rent-up fee) of five hundred dollars (\$500) in addition to any and all rights to withhold other funds as described within this Rental Agreement.

55. **ABANDONMENT.** The Tenant shall be deemed to have abandoned the Premises in the event that the Tenant is delinquent in the payment of the rent specified herein, and the Tenant is personally absent from the Premises for seven (7) or more consecutive days while delinquent in the payment of rent. The Tenant shall be responsible for notifying Landlord of such absences from the Premises if the Tenant does not intend to abandon the Premises. For the purposes of computing damages to the Landlord, Tenant shall be deemed to have given a thirty (30) day notice of termination on the second day of the Tenant's absence from the Premises while delinquent in the payment of rent. Tenant's abandonment shall entitle the Landlord to proceed as set forth in paragraph 56 herein with regard to any of the Tenant's possessions left within or upon the Premises.

56. **TENANT'S POSSESSIONS.** Tenant hereby grants to the Landlord a lien upon all of the Tenant's personal property placed within or upon the Premises, pursuant to Idaho Code, Section 45-815, to secure any and all unpaid obligations from the Tenant to the Landlord. In the event that the Tenant leaves any of the Tenant's personal property or possessions within or upon the Premises at the conclusion of the term hereof, or in the event of an abandonment of the Premises by the Tenant, as set forth in paragraph 55 herein, Landlord may enter into and take possession of the Premises and any of the Tenant's personal property left within or upon the Premises. The Landlord shall have the option of disposing of such personal property by publishing a notice advertising the sale of the same at least ten (10) days prior to the sale thereof and by mailing a copy of the notice to the Tenant by certified mail to the last known address of the Tenant. The proceeds of such sale shall be applied first to the Landlord's costs incurred with regard to the sale, then to the amounts owed to the Landlord, and any remaining balance to the Tenant. Landlord shall also have the option of disposing of such personal property as the Landlord deems appropriate, including donating the same to a charitable organization or placing the same for trash collection. The Tenant hereby releases the Landlord from any and all claims with regard to the Tenant's personal property in the circumstances set forth in this paragraph.

57. **MORTGAGE.** The Premises may be mortgaged or may be subject to a contract for deed. Tenant agrees that the right of the holder of any present or future mortgage or contract for deed is superior to the Owner's Right and in the event of a foreclosure; the Grantor or Trustee has the right to terminate Landlord's management agreement without notice. In the event of a foreclosure, Tenant understands that Landlord may be required to surrender all funds held on behalf of the Tenant to the Grantor or Trustee and Tenant hereby agrees to hold Landlord harmless of all claims and to enter into a new Landlord/Tenant relationship with the Grantor or Trustee. *(Idaho Code, Section 55-811)*

58. **DEFAULT BY TENANT.** In the event of Tenant's default in payment of rental, a breach of any of the other terms and conditions of this Rental Agreement, this agreement and Tenant's tenancy hereunder may be terminated upon three (3) days written by Landlord to Tenant. Tenant shall, by the end of the third day following the giving of any such notice, either deliver up possession to Landlord or, correct the matter in default. Should Landlord be compelled to institute a legal action to recover possession of the Premises by reason of nonpayment of rental by Tenant and should Tenant tender payment of rental after commencement of such legal action, Landlord shall not be required to accept such payments unless Tenant pays the entire rental in default plus attorney's fees, court costs, and service fees incurred by Landlord in said legal action up to said time. Any acceptance by Landlord of a sum less than the amount: (1) shall be totally at Landlord's option and such payment shall be applied first to attorney's fees, court costs, and service fees incurred by Landlord in said legal action, then to rental, and (2) shall not operate to stay said legal proceeding or as any waiver of Landlord's right to possession of the Premises (e.g Landlord need not demise any eviction lawsuit if less than the full aforementioned sum is paid).


59. **MOVE OUT INSPECTION.** The Move-Out inspection will be performed with or without Tenant. The following requirements are necessary to schedule a Move-Out inspection with Tenant: (1) Tenant must schedule Move-Out inspection at least one week in advance and prior to move out date and turning in keys. (2) The unit must be completely vacated, (3) Every attempt to clean thoroughly prior to the inspection should be taken, for there are no follow-up inspections. Failure to comply with the above requirements and if the property requires cleaning prior to new tenants, cleaning charges will incur Tenant's expense. At no time during the inspection will estimates or costs of cleaning and repairs be discussed or promised.

60. **MOVE IN INSPECTION AND ACCEPTANCE.** Tenant is responsible for scheduling the move-in inspection, which is to be completed and submitted within two (2) business days of move-in. Failure to schedule and conduct a move-in inspection with Landlord waives all claims of pre-existing conditions not written elsewhere in this Rental Agreement. Landlord assumes no pre-existing deficiencies.

61. **CONDITION OF PREMISES.** Tenant acknowledges that at the commencement of the term hereof, the Premises, including the personal property referred herein this Rental Agreement, were clean and in good working condition.

62. **NO SMOKING.** Tenant, guests, nor any other person shall be allowed to smoke on the Premises. Tenant agrees to refrain from burning candles or incense. Any violation shall be deemed a material violation of the Rental Agreement. Tenant understands that any damage caused by smoking any substance will be considered damage. Damage includes but is not limited to deodorizing, repairing, or replacement of carpet, wax removal, additional paint preparation, replacing of drapes, countertops, or any other surface damaged due to burn marks and/or smoke damage. Tenant agrees to pay \$50 to ionize the premises to remove all unwanted odors.

63. **CLEANING:** Tenant stipulates that the Premises were cleaned upon initial occupancy. Tenant shall clean and dust the Premises regularly, and shall keep the Premises, particularly kitchen and bath, clean. Tenant agrees to keep the Premises kept clean and free from objectionable odors as determined by Landlord.

The following Tenant initials acknowledges receipt and review of this page: 
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64. **CARPET CLEANING:** Tenant stipulates that the carpets were professionally cleaned upon initial occupancy and free of pet and urine odors and stains. Landlord will provide carpet cleaning upon vacancy at the expense of the Tenant. Costs specifically for professional cleaning of carpets will be automatically deducted. Carpets that become excessively soiled or stained will be charged extra. Upon vacancy, Tenant acknowledges that Landlord will hire a specific carpet cleaning vendor to test the carpets for urine and that Landlord shall not honor any receipts of carpet cleaning and that Landlord will have the carpets cleaned at Tenants expense with the approved vendor of the Landlord.
65. **FIREPLACE/CHIMNEY CLEANING.** Tenant agrees to thoroughly clean and removes all debris from within the firebox, upon vacating the Premises. Tenant acknowledges that upon vacating the Premises, Landlord shall hire a professional chimney sweep to clean the chimney at Tenant's expense.
66. **DRAPERIES.** It is agreed that all draperies and window covering are clean and in good condition. Upon termination of this tenancy, Tenant agrees to have all draperies and window coverings professionally cleaned at Tenant's expense.
67. **LIGHT BULBS.** It is agreed that all light fixtures and appliances have a working and proper wattage light bulb or globe. Tenant agrees to maintain working light bulbs for all exterior light fixtures during tenancy. Tenant further agrees to replace all expired light bulbs with the appropriate style, color, and wattage prior to vacating. Upon termination of this tenancy all missing or expired light bulbs will be replaced at Tenant's expense.
68. **CEILING HEAT.** If Premises has ceiling heat, Tenant agrees to never drive any nails, screws, tacks or any object into the ceiling of the rented Premises.
69. **SIGNS.** No signs of any kind shall be displayed on or from any dwelling unit or vehicle without prior written approval by Landlord, to include but not limited to: political signs, religious signs, posters, or pictures, and/or business signs.
70. **BICYCLES, SKATES, SKATEBOARDS, ETC.:** Skating or riding of bicycles or skateboards is not permitted in the parking area or driveway because of danger to themselves and others.
71. **HALLWAYS AND COMMON AREAS.** Tenant agrees not to store bicycles, furniture, and any other article in hallways or common areas and Landlord has the right to remove or dispose of items found in these areas.
72. **STORAGE.** Tenant agrees not to store gasoline, cleaning solvents, combustible, oil, antifreeze, batteries, or toxic waste on the Premises and to properly dispose of said items. Tenant will be fined \$50 (fifty) as well as charged the cost to remove any of the aforementioned items.
73. **WATERBEDS.** No waterbeds are allowed without written permission from Landlord. Tenants must provide Landlord with a copy of the RENTER'S INSURANCE POLICY that specifically insures accidents and/or damage caused by waterbeds and has Landlord named as an additional insured.
74. **NOISE AND NUISANCE. QUIET HOURS COMMENCE AT 10 PM AND CONTINUE UNTIL 7 AM. TENANT,** guests, or other persons under Tenant's control shall not play upon or allow to be played any musical instrument, or operate any amplified sound system on the PREMISES between the hours of 10:00 pm and 7:00 AM. No radio or sound system shall be operated in the Premises except at a low sound level. No offensive or loud noise, voices, language, or behavior is allowed. The use of fireworks, firecrackers and any type of firearms in or around the Premises is strictly prohibited. In multi-family buildings, loud noises will carry from one unit to another. If Tenant(s) play musical instruments, radios, or televisions loudly enough to disturb neighbors, this shall be deemed a violation of the Rental Agreement. Multi-unit Tenants agree to refrain from using the washer and dryer during quiet hours. Tenants agree to first attempt to resolve noise disturbances between themselves. If disturbances and or nuisances continue, Tenants agree to notify the local authorities and file a report for said action and forward a copy of the police report to the Landlord within five (5) days. Tenant(s) agree not to move in or out of Premises during the quiet hours stated above.
75. **BALCONIES/PATIOS.** Patios, terrace, balconies, are designed for additional space and not storage. Storing or displaying on patios and balconies of boxes, bicycles, refuse, clothing, towels, and other belongings, which are not patio furniture, is prohibited and may be removed or disposed of by Landlord. Patios, balconies, and windows are not to be used for drying clothes or suspending other objects. Refuse, garbage and trash shall be kept at all times in such containers and in areas approved by Landlord. Throwing any items from balconies is strictly prohibited. A gas BBQ grill may be stored or used on the patio or balcony only with the express understanding that the Tenant is solely liable for any damage resulting from such storage or use. Tenant understands that if the Premises has vinyl siding, that the BBQ grill must be used at a distance no closer than six (6) feet from the siding and that Tenant will be held liable for any damage as the result of such storage or use. The use of charcoal barbecues is prohibited unless consent is obtained from Landlord.
76. **DRUG-FREE HOUSING.** Tenant, any member of the Tenant's household, or a guest or other person under the Tenant's control shall not engage in criminal activity, including drug-related activity, on or near Premises. Drug-related criminal activity means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell distribute, or use, of a controlled substance. Tenant, any member of the Tenant's household, or a guest of other person under the Tenant's control shall not engage in any act intended to facilitate criminal activity, including drug-related criminal activity, on or near the Premises. Tenant will not permit the dwelling unit to be used for, or to facilitate, criminal activity, including drug-related criminal activity, regardless of whether the individual engaging in such activity is a member of the household or a guest. Tenant will not engage in acts of violence or threats of violence, including, but not limited to, the unlawful discharge of firearms, on or near the Premises. Violation of the above provisions shall be a material violation of the Rental Agreement and good cause for termination of tenancy. (*Idaho Code, Section 6-303(5)*)

77. **MEGAN'S LAW DISCLOSURE.** Federal and State law requires that all persons who plead guilty or have been found guilty of sex crimes must register with the Chief of Police in the city in which that person resides or the Sheriff of the county if no Chief of Police exists. To obtain further information regarding persons required by law to register as sexual offenders, contact the local Chief of Police or the County Sheriff. *(initial)* I/we hereby acknowledge that I/we have been provided with the foregoing disclosure and I/we have read and understand the same. *(initial)* I/we acknowledge the Owner and Agent to this transaction do not have an affirmative duty to obtain information regarding crime statistics or offender registration. If that information is important to me I have been given the applicable telephone numbers to call and obtain that information myself. Ada County Sheriff/Boise Police Department Records division is (208) 577-3000; Meridian Police Department (208) 888-6678; these numbers are provided as a service and maybe subject to change without notice. *(Idaho Code, Sections 18-8307 and 18-8323)*

78. **INSURANCE.** Tenant is to provide own insurance for their possessions both inside and outside of Premises. Tenant acknowledges and is aware they are responsible for providing insurance for their personal possessions or vehicles and the Landlord's insurance will not cover Tenant's possessions or vehicles and this includes flood, fire, or any other cause. *It is important that the tenant understands that neither the Landlord nor the Owner's insurance company is liable for any of the Tenant's personal property. If the provided refrigerator malfunctions, the owner is responsible for the repair costs of the appliance, but not of any food items lost. If a pipe breaks and ruins all of your possessions, the owner is responsible for the repair costs to the home, but not for any of your personal possessions. Renter's Insurance is very inexpensive and should be considered.* Additionally, Tenant is advised to extend their Insurance Policy to include coverage of Owner's property in the event loss or damage to the Premises occurs. Tenant is hereby notified that in the event of a loss or damage to the Premises or the property within, due to Tenant negligence or Malfunction of Tenant's property, (such as a washing machine), Tenant is responsible for all damage and loss to the Premises to include but not limited to: cleanup, repairs, and replacement expenses to restore Owner's Property and Premises to original condition. Common examples are Tenant supplied washing machines that leak causing a water loss and Tenant caused fires due to carelessness with cigarettes and other combustibles.

79. **TELEPHONE NUMBERS AND EMPLOYMENT.** Tenant agrees to furnish to Landlord a home telephone number within two weeks of occupancy. Tenant also agrees to furnish Landlord any change in employment and employment phone numbers.

80. **CC&Rs and ASSOCIATIONS.** Tenant agrees to comply with all Covenants, Conditions and Restrictions, Bylaws, rules, regulations, and decisions of Landlord's association or Landlord, which are at anytime posted on the Premises or delivered to Tenant. These CC&Rs can change without notice. Tenant shall pay any fines or charged imposed by Landlord's association or other authorities due to any violation by Tenant, or the guests or licensees of Tenant. Community amenities may be available for tenant use but are not used as a basis for rent.

81. **RULES AND REGULATIONS** The conduct of Tenant or Tenant's guests shall not be loud, obnoxious, or unlawful and shall not disturb the rights, comforts, health, safety, or conveniences of other persons in or near the Premises. The guests and licensee of Tenant shall not disturb, annoy, endanger, or interfere with other persons in or near the Premises, or use the Premises for any unlawful purposes, including, but not limited to, using, manufacturing, selling, storing, or transporting illicit drugs or other contraband, or violate any law or ordinance, or commit waste or a nuisance upon or about the Premises.

82. **ALTERATIONS.** Tenant shall not paint, wallpaper, add or change locks, or make any other alterations to the Premises without Landlord's prior written consent except as provided by law. No repairs, decorating, or alterations shall be done by Tenant, without Landlord's prior written consent. Tenant shall notify in writing of any repairs or alterations contemplated. Decorations include, but are not limited to, painting, wallpapering, and hanging of murals or posters. No nails, screws or other fasteners may be nailed, screwed or otherwise placed in the doors, exterior siding or woodwork. Tenant agrees not to use tape or adhesives to adhere any object to any surface of the Premises, such as refrigerators, doors, walls, or siding. Tenant shall hold Landlord harmless as to any mechanics' lien recordation or proceeding caused by Tenant and agrees to indemnify Landlord in the event of any such claim or proceeding.

1. N/A **REASONABLE ACCOMMODATION** is some exception or change that a housing provider makes to rules, policies, services, or regulations that will assist a tenant with a disability in taking advantage of a housing program and/or dwelling. The tenant hereby requests the following accommodations: N/A

2. N/A **REASONABLE MODIFICATION** is an alteration to the physical premises allowing a person with a disability to overcome obstacles that interfere with tenant's use of the dwelling and/or common areas. The tenant hereby requests the following modifications: N/A

83. **SATELLITE DISHES and CABLE INSTALLATION.** Tenant understands that any installation of a satellite dish/cable requires Landlord's approval prior to installation. For satellite installation Superior Satellite must be contacted. Please note that if proper authorization is not received for satellite installation by Superior Satellite before any installation and another company completes an install you will be liable for a \$250.00 fine for installation to be corrected. For Direct TV customers and employees, there is a \$100 deposit due and must be paid to Superior Satellite before any installation will be done. Any equipment attached to buildings that is not allowed could result in a fine of up to \$500 in addition to all repairs necessary to restore the building to its original condition. Prior to any authorization of the installation of cable, a deposit must be paid by Tenant. Prior to any release of this deposit, the authorization form must be returned with the installation contractors' information and signature.

The following Tenant initials acknowledges receipt and review of this page:
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84. **OWNER/AGENT SHALL NOT BE LIABLE.** Landlord shall not be liable for damages or losses to persons or property caused by other residents or persons. Landlord shall not be liable for personal injury or damage or loss of Tenant's personal property from theft, vandalism, fire, water, rain, hail, smoke, explosions, sonic booms, power failures, appliance failures or other causes whatsoever unless the same is due to negligence of the Landlord. Landlord strongly recommends that Tenant secure insurance to protect against the above occurrences.

85. **SEVERABILITY.** If any provision hereof shall be held by any Court to be unlawful, all of the remaining provisions of this Rental Agreement shall remain in full force and affect.

86. **APPLICATION OF FUNDS.** Monies paid by Tenant shall be applied in the following order (1) Non-Sufficient Fund Fees, Late Fees and/or service fees (2) Tenant Caused Billing (3) Past Due Utilities (4) Attorney Fees (5) Tenant caused property damage, (6) Past Due Rent, oldest month to newest, no matter what the memo line of the check says. (*Idaho Code, Section 6-321*)

87. **MILITARY CLAUSE**

~~X~~ The Tenant(s) in this Rental Agreement are NOT members of the military and do not require a military clause. Additionally, Tenant(s) agree to notify Landlord in advance and in writing, if anyone living on the Premises joins any branch of the military.

N/A The Tenant(s) in this Rental Agreement are members of the military and will be released from the Rental Agreement if military orders command them to relocate to an assignment farther than twenty (20) miles from the Premises. Tenant is responsible to submit written 30-days notice and all rents due for that time, plus the repayment of any lease incentives for the current lease term.

88. **SERVICE FEES:** Tenant agrees to pay \$25 for each notice delivered to the Premises by Landlord for eviction, notice for a lease violation, and notice when Tenant has terminated any Tenant paid utilities.

89. **POSSESSION.** If Landlord is unable to deliver possession of the premises at the commencement hereof, Landlord shall not be liable for any damage caused thereby, nor shall this agreement become void, but tenant shall not be liable for any rent until possession is delivered. Tenant may terminate this agreement if possession is not delivered within 7 days of the commencement of the term hereof.

90. **CREDIT REPORTING/COLLECTIONS.** Tenant understands and acknowledges that if the Tenant fails to fulfill the terms of their obligations within this Rental Agreement, a negative credit report reflecting the Tenant's credit may be submitted to a credit-reporting agency. It is also agreed that in any legal action brought by either party to enforce the terms hereof or relating to the demised premises, the prevailing party shall be entitled to all costs incurred in connection with such action, including a reasonable attorney's fees and any fees or commissions charged by any collection agency to reimburse the property owner with all funds due.

91. **COLLECTIONS.** By signing this document, I understand and agree that if my account with First Rate Property Management becomes delinquent and payment is not made on amounts owing under the terms of my tenancy, and the balance is placed with a licensed collection agency, I agree to pay the fees of the collection agency, which amount is theretofore agreed to be 50% of the outstanding balance at the time the account is placed for collections. The 50% collection agency fee will be calculated and added at the time the account is placed into collections.

92. **ENTIRE CONTRACT.** Time is of the essence. All prior agreements between Landlord and Tenant are incorporated in this agreement which constitutes the entire contract. It is intended as a final expression of their agreement with respect to the general subject matter covered, and may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement. The parties further intend that this agreement constitutes the complete and exclusive statement of its terms and that not extrinsic evidence whatsoever may be introduced in any judicial or other proceeding, if any, involving the Rental Agreement.

93. **ATTORNEY FEES.** If any legal action or proceeding be brought by either party to enforce any part of this AGREEMENT, the prevailing party shall recover, in addition to all other relief, reasonable attorney's fees and costs, but not to exceed \$750.00 (seven hundred fifty dollars). If Tenant defaults in the performance of any obligation under this Rental Agreement, Tenant shall pay, in addition to any other sums owed, Landlord's reasonable attorney's fees and other cost related to the enforcement of the obligation. This clause applies in any lawsuit, action, or proceeding brought by Tenant to enforce Tenant's obligation under this Rental Agreement, whether or not the Rental Agreement is terminated and whether or not Landlord files a formal lawsuit, action, or proceeding in court. Landlord and Tenant expressly contract that, if it becomes necessary for Landlord to commence a legal action to recover possession of the Premises by reason of nonpayment or other breach of the Rental Agreement by Tenant (Unlawful Detainer action), Tenant agrees to pay the reasonable attorney's fees (not to exceed \$750) incurred by Landlord in bringing such action to recover possession, and agrees that the Court may award such attorney's fees as costs in such legal action. (*Idaho Code, Section 6-324*)

94. **CO-SIGNER.** By affixing signature below, co-signer promises to guarantee the Tenants compliance with the financial obligation of the Rental Agreement. Co-signer understands that he/she may be required to pay: current rent, past due rent, collection costs, non-sufficient funds charges, court costs, late fees, lease fees, advertising costs, cleaning, repairs, or costs that exceed Tenant's security deposit. Co-signer further agrees that Landlord will have no obligation to report to Co-signer should Tenant fail to abide by the terms of the Rental Agreement and waives presentment, demand, protest and notice of acceptance, notice of demand, notice of protest, notice of dishonor, notice of default, notice of nonpayment, and all other notices to which co-signer might otherwise be entitled. Co-signer recognizes that Landlord has agreed to rent to Tenant only because of this guaranty and that the continued validity of this guaranty is a material term of this Rental Agreement. Co-signer further understands that if Landlord and Co-signer are involved in any legal proceeding arising out of this Rental Agreement, the prevailing party shall recover reasonable attorney fees, court costs and any cost reasonably necessary to collect a judgment. Co-signer understands that this will remain in force through the entire term of the Tenant's tenancy, even if their tenancy is extended/or changed in its terms. The following items are required to remove a co-signer from a renewal Rental Agreement. 1) Co-signer must remain on Rental Agreement for a minimum of one year 2) There can be no late rent payments 3) No disconnect notices from any of the utility companies 4) No lease violations during the lease period 5) There can be no balance owing on the account 6) FRPM must do a property inspection to confirm that the property is

The following Tenant initials acknowledges receipt and review of this page: _____
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properly maintained // FRPM supervisor approval.

Rental/Lease Agreement dated **APRIL 8TH, 2011**, for Premises located at **1805 E. OVERLAND #4624 MERIDIAN, Id. 83642**
With Tenant, **ADRA KIPPER**

95. **NONWAIVER CLAUSE.** Landlord's failure to strictly enforce individual terms of this agreement does not constitute waiving the LANDLORD'S right to enforce the specific term, condition or policy.

96. **SLIDE SHOW:** I viewed the slideshow presentation which followed my lease precisely and offered summaries and graphics to reinforce the conditions of my rental agreement.

97. **COPIES:** Tenant acknowledges receipt of fully executed Rental Agreement and Move-In Inspection Sheet. Landlord will provide additional copies of the Rental Agreement and Move-In Inspection Sheet at a cost of \$0.10 per page payable in advance.

98. **INTERPRETATION OF CONTRACT**

☒ I do not need an interpreter and can understand the Rental Agreement in its entirety.

☐ N/A I have provided an interpreter for renting the property and interpreting the rental contract. My interpreter's name is _____ Address: _____

99. **WE ARE AN EQUAL OPPORTUNITY HOUSING PROVIDER.** We fully comply with the Federal Fair Housing Act. We do not discriminate against any person because of race, religion, sex, handicap, familial status, color, or national origin. We also comply with all state and local fair housing laws.


100. **ADDITIONAL AGREEMENTS. TENANT IS SIGNING A 12 MONTH LEASE AGREEMENT AND IS RECEIVING A \$30 APPROVED APPLICATION CREDIT TAKEN OFF APRIL 2011 RENT AS A MOVE IN INCENTIVE. IF TENANT FAILS TO FULFILL THE FULL LEASE TERM TENANT WILL BE RESPONSIBLE FOR PAYING BACK INCENTIVE AND ANY AND ALL CHARGES AS DESCRIBED IN THE LEASE AGREEMENT.**

101. **ATTACHMENTS.** The undersigned Tenant acknowledges by initialing the following attachments to this Rental Agreement are incorporated into this Rental Agreement.

☒ Homeowner's Association Rules and Regulations

☐ N/A Assigned Parking Map

(Provided for your guidance only. FRPM does not manage the HOA.)

Funds To Be Collected	Funds Due	Move-In Credits	Funds Paid	Check No.	Date	Balance	Check No.
Deposit	\$550.00	\$0.00	\$550	0631826470	4-15-11	\$550.00	
Pet Fees	\$0.00	\$0.00				\$0.00	
Cable/Satellite Fees	\$0.00	\$0.00				\$0.00	
Apr-11 Rent	\$47.00	\$30.00	\$30.00	APPMIC	4/29/11	\$17.00	
May-11 Rent	\$705.00	\$0.00				\$705.00	
Total	\$1,302.00	\$30.00	\$30.00			\$1,272.00	

102. **SIGN AND DATE:** By signing below, the Tenant acknowledges receipt of a complete copy of this Rental Agreement with all blanks filled in.

LANDLORD


Date 4-15-11

TENANT SIGNATURE(S)



Date 4/15/11

Date _____

Date _____

The following Tenant initials acknowledges receipt and review of this page:
Last Revised: 02.25.2011

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000199FR06157

3

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)	
HYMAS, individually and as)	
the natural parents of)	
PRIVATE FIRST CLASS McQUEN C.)	
FORBUSH, USMC (Deceased),)	
and BREANNA HALOWELL,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. CV PI 1304325
)	
SAGECREST MULTIFAMILY PROPERTY)	
OWNERS' ASSOCIATION, INC., an)	
Idaho non-profit corporation,)	
d/b/a SAGECREST MULTIFAMILY)	
PROPERTY OWNERS' ASSOCIATION,)	
et al.,)	
)	
Defendants.)	
)	

DEPOSITION OF MATTHEW E. SWITZER

December 6, 2013

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

1 management company on Building 46?

2 A. From this date until the -- roughly the
3 date of the incident. They terminated -- I know
4 they terminated the contract with Sagecrest and all
5 the owners. I think it was effective December 1st,
6 so shortly -- right after the incident.

7 Q. Okay. And under Section 2.1, I'm not
8 going to read it, but my understanding is that --
9 is you're appointing First Rate as your agent.

10 Is that correct?

11 A. That's correct.

12 Q. Okay. And then under 2.5, there's --
13 under Section 2.5, there's -- you're authorizing
14 the -- First Rate to contract for services related
15 to your property?

16 MR. MILLS: Object to the form.

17 THE WITNESS: Yes.

18 Q. (BY MR. CLARK) Okay. Let's go to page 5
19 of the contract, please.

20 Under Section 9.4, it addresses biannual
21 preventative maintenance.

22 Is that correct?

23 A. Uh-huh.

24 Q. Were you ever billed for biannual
25 preventative maintenance during the year 2012?

1 at any natural gas appliance in any of the other
2 buildings that you're affiliated with?

3 A. Yes. I -- my thermostat on my home in
4 California stopped working, and I called the
5 furnace company and they came out. It was just two
6 weeks ago and gave me -- and did a little service
7 and replaced my thermostat.

8 Q. Is that something you called the gas
9 company for?

10 A. No.

11 Q. What was your expectation with First
12 Rate as to what they would contact you about in
13 terms of maintenance?

14 A. They would -- they were my agent. They
15 would contact me regarding any kind of maintenance,
16 upkeep, service, preventative maintenance,
17 problems, wear and tear, carpet, whatever the issue
18 may be. They would be the one -- they would
19 contact me and ask me how I wanted to handle it,
20 whether -- and would advise me if it was something
21 that could be repaired or replaced.

22 Q. Would they advise you when they go in
23 and just perform routine maintenance?

24 A. No.

25 Q. So if they were to go in and replace a

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 14th day of December, 2013.



Andrea J. Wecker

ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.

My Commission Expires: 2-14-17

[133]

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From: Sagecrest
Sent: Friday, April 15, 2011 2:45 PM
To: VJK
Cc: Sheila Thomason; Lizz Loop; Marie Swanson
Subject: Water heaters- gas smell

Intermountain gas came out today and inspected an empty unit to try to find out what is causing the gas smell from the water heaters. He said the problem is with the venting. There are two different kinds of water heaters here, some have a metal screen around the bottom of the tank, the others don't have the screen that goes around, but one in the middle on the bottom. Those get clogged with lint, hair, debris very easily and if there is not adequate air flow from the bottom then the water heater cannot release exhaust. He said we just need to clean/vacuum off the screens and it will be fine. I think we should add this to the turnover spreadsheet under Typical Items for Chris to vacuum out the bottom area and screens. Let me know if this is ok to add to the list of turnover items.

Thanks,

Tara

Tara Gaertner

Sagecrest Apartments

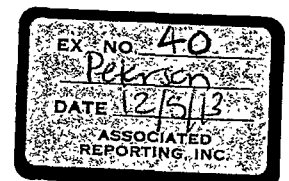
First Rate Property Management

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7/15/11	MR	4 showings for #4912		7/15/11
7/15/11	MR	Worked on 30-day for #5612 for David Warwick		
7/16/11	MR	Accepted 3 applications with deposits #4712, #2223		7/16/11
7/16/11	MR	Checked #2223 for turn over		7/16/11
7/16/11	MR	Watered flowers and clean windows Outside building	Preventative Maintenance	7/16/11
7/16/11	MR	2 showings of C floor plan #2223		7/16/11
7/16/11	MR	4 work orders were placed for Chris.	Maintenance	7/16/11
7/16/11	MR	Accepted funds for people who had late charges and posted emails to Lizz in regards to them.		7/16/11
7/16/11	MR	worked on the Lease Abstracts		7/16/11
7/17/11	MR	Answered several inquires via E-mail		7/17/11
7/17/11	MR	Changed at the trash outside	Preventative Maintenance	7/17/11
7/19/11	TG	Emergency call last night 1811 gas smell. Intermountain gas came out, reading was so high it was deadly. Intermountain gas has a problem with express plumbing breaking the honey comb. Express plumbing is no longer going to do this. All water heaters are going to need to be replaced.	Water Heaters	7/19/11
7/19/11	TG	typed up lease for 4924, 3024, 4912 and sent them all over via docusign.	Leases	7/19/11
7/19/11	TG	Processed 30 day for 1724 we gave him notice for being an asswad tenant.	Gave 1724 notice	7/19/11
7/19/11	TG	Processed 30 day for 1523	30 Day notice	7/19/11
7/19/11	TG	Contingent lease for 4912	4912	7/19/11
5/18/11	TG	Water heaters- Express Plumbing bid to clean out water heaters \$39, may replace thermocouple at the same time. They will be installing a mesh screen to go around the bottom to prevent lint from getting to the water heater. We decided this work needs to be owner approved. During filter changing i am getting a list of which water heaters are "Reem" and which are "AOSmith." If they are Reem they wont need cleaning, if it is AOSmith they need cleaned. After i get the list together i will contact owners and start at 3 buildings at a time if owner approves it. At training with Express Ben said he did not feel comfortable doing this work. We will have to try a different avenue.	All water heaters need replaced, this is no longer in effect	7/20/11
2/26/11	TG	POOL/HANDICAPPED SIGNS Current pool signs are: 1- Pool hours 9am - 9pm 1- No Alcohol in or around pool area 1- Max Depth 5 ft. No Diving Allowed 1-Pool Rules: No Glass; No Running; No one under 16; No diving; No rafts or floating chairs; No horse play; No life guard on duty. "swim at your own risk. Please clean up after yourself!!!" Below is Jon's email: We believe there should be at least 2 pool rules signs posted. the current sign needs to be reviewed to be sure it is in compliance and current. We believe there needs to be 2 - 4 signs that clearly state no life guard swim at own risk. In addition, a sign on the gates stating no one under the age of 18 without adult supervision. Missing 3 handicapped signs in front of following buildings: 32; 40 & 23 5-18 Jon got pool signs, Cris to install. Lizz to order playground, fitness and no lifeguard on duty signs from Jon's email. Chris has installed handicapped signs and reserved parking signs in sagecrest parking lot.	Jon got pool signs, Lizz to order 2 Playground signs, 1 Laminated vinyl fitness RM sign & 4 "no lifeguard on duty signs & 4 handicapped signs. Lizz ordered 5-25	All signs posted
7/20/11	TG	Move in inspection with #4411	Move in	7/20/11
7/20/11	TG	Delivered notices to 3 buildings, 1 of each floor plan for Express to come in and test for Carbon Monoxide	Delivered notices	7/20/11
7/20/11	TG	Called on renewals	Renewals	7/20/11
7/20/11	TG	Delivered carpet cleaning work orders for renewals for July	Renewals	7/20/11
7/20/11	TG	Received contingent 2212	Contingent lease	7/20/11
7/20/11	TG	Move out inspection, sent turnover for 4912 new tenant moves in 7/23	Turnover	7/20/11
7/20/11	TG	Delivered flowers for 5012 lost husband	Tenant	7/20/11
7/21/11	TG	Leasing stuff. Sent lease for 4924 only 5 unrented units not vacant	Leasing	7/21/11

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them and the hone cone is meant to not be broken. If someone dies and it's from a water heater that Express has broken the honey cone... then what? Ben's not going to do it anymore.

Tara Gaertner

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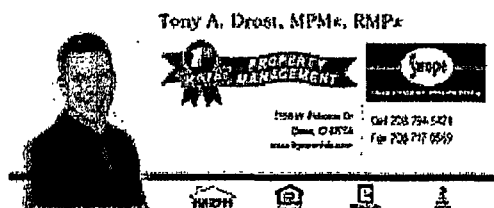
From: Tony Drost

Sent: Thursday, July 21, 2011 9:25 AM

To: Sagecrest; Lizz Loop; Marie Swanson; Sheila Thomason

Subject: RE: Red flag

Please let me know the results of the test. I am having a hard time believing that we have to replace them and there is no acceptable retro available. But, I'll trust the experts.



Tony A. Drost

www.frpmrentals.com

www.boiseinvestmentproperties.net



From: Sagecrest

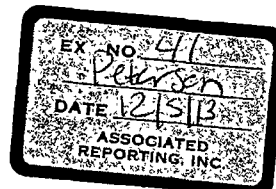
Sent: Wednesday, July 20, 2011 11:23 AM

To: Tony Drost; Lizz Loop; Marie Swanson; Sheila Thomason

Subject: Red flag

We have a very serious situation going on at Sagecrest. I just had a meeting with the big wigs at Intermountain Gas and Ben and Brad with Express Plumbing. Monday night there was an emergency call regarding gas smell from 1811. Intermountain Gas came out and the reading of the Carbon Monoxide was deadly. If the tenants had been in there for 45 more minutes they would have died. Exact words Intermountain Gas used. They were wanting to know what was being done to fix this problem in the past. Breaking the honey cone and cleaning the vent is what they have done in the past. Intermountain Gas is no longer going to be clearing the water heaters if they have been "modified." Ben is done with the AOSmith water heaters. Express is no longer going to be doing any kind of cleaning or maintenance on these water heaters. We have all

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conclusion that the only way to fix this problem without modifying the water heater is to replace them completely.

I talked to Jon about this last night, he said since this is an owner expense that I'll have to send something to the owners and have them decide what they want to do. If they want to replace all together at the same time or do them once a month for example. Talking with Express and Intermountain Gas they both said they firmly do not think this should even be an option to the owner, that all AOSmith water heaters need replaced regardless and they need replaced as soon as possible. If the owners decide they do not want to then they will have to sign a waiver basically stating that if a tenant dies FRPM, Express & Intermountain Gas is not held liable for it.

Intermountain Gas wants to know what is being done NOW to prevent this from happening tomorrow. I am delivering notices to all doors today. Express is going out and buying a Carbon Monoxide tester today and will be out tomorrow testing everyone's water heater to make sure there are no high readings.

My question is: Can we make the replacing of the water heaters mandatory or does it have to be an option to the owners?

Tara Gaertner

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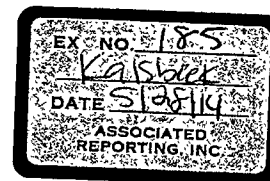
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Subject: Water Heater Needs Replaced ASAP
From: "Sheila Thomason" </O=FRPM/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=SHELIA>
Sent: 7/29/2011 4:44:26 PM
To: "Sheila Thomason" </O=FRPM/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=Sheila>
"hanoverholdings@gmail.com"
<hanoverholdings@gmail.com>; "aire1@pacbell.net"
<aire1@pacbell.net>; "Geneservatius@yahoo.com"
<Geneservatius@yahoo.com>; "calico2640@msn.com"
<calico2640@msn.com>; "takatori1@frontier.com"
<takatori1@frontier.com>; "wmraffdesigns@yahoo.com"
<wmraffdesigns@yahoo.com>; "Raffbeth@yahoo.com"
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<grandmabj@aol.com>; "cmschwab@aol.com"
BCC: <cmschwab@aol.com>; "jpowell@digitallore.com"
<jpowell@digitallore.com>; "naisaechao0485@yahoo.com"
<naisaechao0485@yahoo.com>; "pursestrings@gmail.com"
<pursestrings@gmail.com>; "janet@parrfamily.com"
<janet@parrfamily.com>; "paul.ryan@marcusmillichap.com"
<paul.ryan@marcusmillichap.com>; "bcoopers6@yahoo.com"
<bcoopers6@yahoo.com>; "dbmeisner@gmail.com"
<dbmeisner@gmail.com>; "bycappa@aol.com"
<bycappa@aol.com>; "jerryehlers@johnlscott.com"
<jerryehlers@johnlscott.com>
Attachments: image001.png; image002.png; image003.png; sagecrest water heaters.docx; water heaters.pdf

The water heaters listed at your properties are allowing carbon monoxide into the apartments at dangerous levels that potentially could cause death to your tenants. Below listed are the levels part per million and toxic symptoms that occur within the specified time frame. Next to the property listed is the concentrated amount of carbon monoxide in your apartment. You can see where your unit falls and the potential hazards as stake. Intermountain Gas has been out to the complex on numerous occasions and shut the service off to several apartments within the last 2 years. The last unit had over 4,000 ppm of carbon monoxide in the unit. Intermountain Gas told us and the tenants they could have died if they were in the apartment much longer. This was very alarming to all of us especially since this could be happening in any of the units. Carbon monoxide doesn't have a smell so isn't easily detected. This specific tenant also smell gas so they called myself at which time I instructed them to call Intermountain Gas immediately for testing. Intermountain Gas has been willing to work with us to get proper testing done on all of the water heaters for the properties that we manage. They weren't willing to do this themselves but showed Express Plumbing what equipment was needed and then went through some units with us to show how to properly test. Express Plumbing has been involved and done extensive research on different water heaters. Attached



FR 7098

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is a letter from them explaining the situation. I have also attached photos of some of the water heaters that we have already replaced showing the cause and the damage that has been done to the water heaters themselves. We have already attempted to clean some of the water heaters but the internal damage is too severe they can no longer be reinstalled.

200 ppm- Slight headache, tiredness, dizziness, nausea after 2-3 hours

400 ppm- Frontal headaches within 1-2 hours, life threatening after 3 hours

800 ppm- Dizziness, nausea and convulsions within 45 minutes. Unconsciousness within 2 hours. Death within 2-3 hours.

1,600 ppm- Headache, dizziness and nausea within 20 minutes. Death within 1 hour.

3,200 ppm- Headache, dizziness and nausea within 5-10 minutes. Death within 30 minutes.

6,400 ppm- Headache, dizziness and nausea within 1-2 minutes. Death within 10-15 minutes.

#1612- 2,200 ppm
ppm

#3312- 910

#4412- 2,200 ppm

#5411- 47 ppm but the top of the water heater is deformed-due to explode soon

#2311- 650 ppm
ppm
2,180 ppm

#3411-1,200

#4424- 450 ppm

#5511-

#2711- 2,700 ppm
ppm
2,067 ppm

#3424- 2,126

#4712- 2,400 ppm

#5523-

#2723- 2,108 ppm
ppm

#3923- 550

#4723- 300 ppm

#2923- 2,200 ppm
ppm

#4123- 2,319

#4823- 300 ppm

#3224- 2,222 ppm
ppm

#4211- 2,319

#5024- 450 ppm

#3311-2,300 ppm
ppm

#4411- 2,201

#5323- 2,082 ppm



We are working on long term solutions so the same problem doesn't happen in another 5 years. You will be notified once we have a solid plan. Either way they do need to be replaced for the safety of the tenants. The initial design and location of the water heaters was a poor choice on the builders end. We are not replacing the water heaters with the same set up but we are looking at altering the environment around them (per code) to guarantee longevity of the new water heaters and safety of the tenants. I fully understand that this is a large expense. Some of you have multiple water heaters that need to be replaced. Unfortunately there isn't any other options. As owners you are required to provide a safe living environment. Since there are a large amount of water heaters that need replaced we are able to get a discount install of \$650 each. They have already purchased 20 water heaters to lock in this rate. This will include four new supply lines and a new belly pan under the water heater. We have attempted to collect from the builders Insurance company for multiple issues at the complex but have been unsuccessful.

We will be contacting all of the tenants in danger letting them know we have requested the water heater to be replaced. I will provide them with safety precautions and a carbon monoxide detector if requested until the water heaters can be replaced starting the beginning of next week.



I will need a written response from each of you for documentation purposes. I will also follow up with a phone call to ensure you have received and read this email. Please let me know which building you own and if I have approval to replace your water heater(s) listed. If you prefer to use a different vendor I would like that information with an approximate date to inform the tenant. Please be sure that your vendor installs the proper type of water heater.

Please feel free to call myself on the number below or Jon (POA Pres) at 925-228-7000 for any further questions you may have.

Thanks,

Sheila Thomason



First Rate Property Management, Inc. CRMC®

Maintenance Supervisor

FR 7100

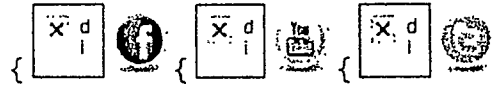
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208-577-5201 direct line



208-321-1901 fax

www.frpmrentals.com



click [HERE](#) to complete our Maintenance survey

click [HERE](#) to complete our Owner survey



FR 7101

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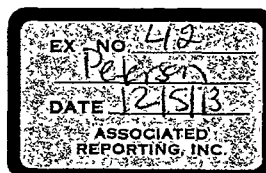
July 2011

To Whom it May Concern:

The water heater problem at Sagecrest Apartment has recently been brought to my immediate attention. Sagecrest Apartments has been one of hundreds of accounts for over a year. With the development of recent multiple incidences with multiple waters heaters, I have been investigating the bigger solution to the significant problems. Since Sagecrest has been on my account, we have replaced countless numbers of thermal couplings, issues with carbon monoxide and blown up waters heaters or red-tagged water heaters. Alone, these would be regular incidents without any alarm, but together these issues alerted me to a bigger issue to investigate since this has been an ongoing issue with Sagecrest Apartments and none of my other accounts. During my investigation I have uncovered some alarming issues that as a plumber, I would recommend immediate action. I am recommending a long term solution, rather than the short term fix that has been repeated for several years.

Since 2002, water heaters have been manufactured as a sealed combustion chamber with an air intake filter and a flame arrestor built into the base. Presently all water heaters have to be a sealed combustion chamber with a non-removable filter to meet code standards. Prior to this, water heaters were open chambers and hadn't changed much since 1889. An open chamber water heater would last 10 to 15 years with very little maintenance, a home owner could re-light or do maintenance easily accessible door. The new water heaters with sealed combustion chambers have two bolts and gaskets to seal the door down, allowing no air to enter, except through the designated filter. These sealed combustion chambers are safer and more energy efficient for two main reasons; any potential gas leak would be sealed within the water heater and it allows for an oven-like chamber to heat the water using less gas and energy. This sealed combustion chamber water heater is harder to gain access to the mechanics to allow for professional maintenance. On most of these models, there is a one inch view port for inspection of the burner that pulls air through the intake filter at the bottom of the heater and to identify the condition of the pilot assembly. This filter has to be clean to allow for the maximum amount of air to flow through allowing efficient burning.

The water heaters at Sagecrest Apartments have had problems from day one for one reason or another. One problem that has been an issue is the drain pans that are under the water heaters to stop water leaks from causing damage to your apartment have been cut up or removed to gain access to the filter for maintenance. By removing or cutting up drain pans this has the potential to cause property damage because all water heaters will leak at one point. The main problem in two out of three floor plans at Sagecrest is that the dryer and washer are located next to the water heaters, which are all located in a tiny sealed off room. As the dryer runs, it produces lent and dust at the same time, therefore pulling and pushing a lot of air around this compacted space. This lent and dust clogs the filter on the bottom of the water heater, which does not let the extra gas and heat escape through the exhaust pipe. As the dryer is working it suppresses the air to the water heater and the sealed combustion chamber gets hotter and hotter until the tank erupts at the seams or melts the metal in the chamber. In my 12 years of plumbing, I have never seen a new water heater burst at the seam or melt metal in the chamber. From my investigation I have concluded that with the filter clogged with lent or



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dust for an extended amount of time it causes the flame and gas to not escape properly and collect within the water heater chamber. In turn this causes extreme heat which deforms the filter by melting it and causing further inability to obtain air through it. These water heaters are the ones that have been tagged by the gas company due to the unsafe level of carbon monoxide that is being produced. Although not all water heaters have been tagged, the potential for the same situation to happen is seen in all floor plans. These water heaters are producing carbon monoxide levels comparable to the average car producing 2100 parts per million (ppm) of carbon monoxide in a closed room. At these levels of carbon monoxide, you would experience headache, dizziness and nausea within 5-10 minutes preceding death within 30 minutes. An average new water heater will safely produce 10 PPM of carbon monoxide, at a safe healthy level. The water heaters at Sagecrest with a clogged filter and a combustion chamber that is damaged are producing 2000 to 3000 PPM of carbon monoxide through the exhaust vent. This is a serious health problem. Combined with a clogged filter and a room occupied by a dryer that also consumes air, the water heaters are working twice as hard to obtain air, causing more maintenance and damage than normal wear and tear. Not to mention the carbon monoxide being emitted into the apartment because as the dryer is pulling air from the exhaust vent for the water heater, it is eliminating the carbon monoxide to properly be pushed out through the exhaust vent. Instead the carbon monoxide is being emitted directly into the apartment, at potentially deadly levels of over 2000 PPM. The maximum allowable concentration for a continuous exposure to carbon monoxide in an eight hour period is 50 ppm. At Sagecrest some apartments were tested resulting in levels forty times higher than the maximum allowable concentration for continuous exposure to carbon monoxide. I would strongly recommend that these issues be solved before any tenants suffer health problems or death.

Express Plumbing Service

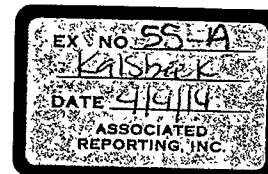
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SAGECREST POA MEETING

OCTOBER 31, 2011

- I. CALL TO ORDER: 10/31/11 TIME: 10:03am Mountain time
- II. INTRODUCTIONS:
- III. ROLL CALL OF OFFICERS:
- | | | |
|---------------|----------------|------------------------------|
| Jon Kalsbeek | President | |
| Jay Arla | Vice President | Proxy Jon Kalsbeek (3 votes) |
| Chris Schwab | Treasurer | via phone |
| Barbara Cappa | Secretary | via phone |
- IV. MEMBERS IN ATTENDANCE:
- | | |
|--------------------------|-------------------------------|
| Gene and Mary Servatius | |
| Mark Duffin | |
| Winston Stokes | |
| David Meisner | |
| Paul Ryan | |
| Joe Crotty | |
| Beth Raff | via phone |
| Pam lee | via phone |
| Janet Parr | via phone |
| Jeanie Schwab | via phone |
| Matt Switzer (sp) | Via phone |
| Eleanor Becker | Via Phone |
| Young Lim | Via Phone |
| Colin Takatori | Via Phone |
| Frank Delo | Via Phone |
| Mathew Conner | Proxy Jon Kalsbeek (2 votes) |
| Ron Facciano | Proxy Jon Kalsbeek |
| Ray and Eleanor A Becker | Proxy Jon Kalsbeek |
| Ziran Yang | Proxy Tony Drost |
| Jared Heiner | Proxy David Meisner (2 votes) |
- V. READING OF LAST MEETING MINUTES:
- Motion was made, seconded, and approved to accept the minutes as presented.
- VI. TREASURER'S REPORT:
- Motion was made, seconded, and approved to accept the Treasurer report as presented.
- VII. PROPERTY MANAGEMENT REPORT:
- A. President Jon Kalsbeek discussed changes made over the past year as well as the economic status of the Greater Boise Area.
- B. Property Valuc/Foreclosures:
1. Building 57 was foreclosed and has a pending sale.
 2. Building 24 has a pending short sale
- VIII. REVIEW OF 2011:
- A. UPDATE ON VACANCIES:
- A Floor plans: Average rent is \$672 with a range of \$625 - \$745
- B Floor plans: Average rent is \$686 with a range of \$575-\$730
- C Floor plans: Average rent is \$612 with a range of \$520 - \$750
- B. LANDSCAPING REVIEWED-DIAMOND LAWNS
- Several members stated that they had walked the grounds and were happy with how the complex looked.
- C. DELINQUENT UNITS WITH HOA DUES
- Building #57 has not paid September, October, or November dues. FRPM has sent invoices to the bank and listing agent. POA to direct FRPM if a lien is to be filed.

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SAGECREST POA MEETING
OCTOBER 31, 2011

- D. "FOR RENT" ADVERTISING RESULTS
As a result of a better rental market, FRPM has reduced the number of PAID advertising feeds, which has reduced the monthly advertising cost to \$100/month. President Jon Kalsbeek explained that the FOR RENT magazine continues to provide lead and foot traffic.
- E. NORTH SIDE FENCE COMPLETED
- F. OTHER ITEMS:
1. New alarm system was installed for the clubhouse/office
 2. Gene Servatius expressed a concern for several concrete areas. This issue was later addressed in the meeting.
 3. President Jon Kalsbeek read a letter from Ron Faciato stating his pleasure as to how things are going at Sagecrest.
- REMEMBER THESE ITEMS ARE FOR THE 2012 FISCAL YEAR.**
- IX. OLD BUSINESS:
- A. CC&Rs, BYLAWS, COMPLEX RULES:
President Jon Kalsbeek stated that he and Tony Drost with FRPM have been reviewing the CC&Rs, Bylaws, and Complex rules for minor corrections and changes. Once complete, the board will review and then the association attorney will review. Upon completion, all governing documents will be sent to the POA members for review and approval.
- B. RESOLUTION BUSINESS PARK-POA:
President Jon Kalsbeek stated that he along with Virginia Kalsbeek and Tony Drost had attended their annual meeting. There are no changes regarding this relationship.
- X. NEW BUSINESS:
- A. LANDSCAPE BID
The POA Board presented a number of bids and made a recommendation to hire TMS. References were good and quote for the same services is over \$9,000 cheaper. A motion was made, seconded, and approved to accept the proposal and hire TMS for the 2012 yard care needs.
- B. WATER HEATER AND A/C PROBLEMS=PRV'S:
President Jon Kalsbeek stated that the four part program has removed the flooding problems. However, not all owners have had this work performed and as a result, several floods occurred. Jon requested that FRPM compile a list of all units that have had the work done to include an updated price. As a reminder the proactive repairs which to date have prevented any floods and the subsequent major costs associated to it are to:
1. Filters provided by POA and changed on a regular schedule
 2. Install Freeze states in each unit
 3. Install Pressure Regulator Valve per building
 4. Replace Expansion tanks
- C. SMELL OF GAS AND WATER HEATER REPLACEMENT
The POA hired a HVAC Engineer to inspect the units and make a recommendation at a cost of \$1,000. The engineer's recommendation was to:
1. Increase the fresh air intakes in wall for all floor plans
 2. Replace the existing water heater with a different manufacturer that had side vents for floor plans A and B and C units as they fail for other reasons.
 3. Add louvers to the closet doors for C floor plans
- President Kalsbeek requested FRPM to send a report showing which units have had the above work done. The list should show which units have had the work done as well as the name of the new water heater and current cost to include parts and labor.

It was requested that the Sagecrest Resident Managers test for CO at the time they are replacing the filters and notify the appropriate owner should there be concerns to discuss options.

SAGECREST POA MEETING

OCTOBER 31, 2011

Upon turnovers, Resident Managers are to encourage owners to replace the smoke detectors near the water heater area with a dual CO and smoke detector that hooks up to the current electrical plug with a battery as back up.

It was requested that FRPM send out a master list showing exactly which units have had what work done on them. Additionally, they would like a list of pricing and manufacturer and model number for all major appliances (refrigerators, stove, microwaves, dishwashers, washer and dryers) as some owners state that they were able to find them cheaper, which should not be the case. This list should include the pricing for Freeze stats, PRV, expansion tank, water heater replacement, fresh air vent replacement, installation of louvers on closet doors, and cost of CO/smoke detectors. Also, include the cost to install the A/C condenser locks to protect from huffing?

D. FENCE COMPLEX:

It was discussed the need to install fencing to match existing along the southeast corner of the complex to stop high school kids from walking through the complex, huffing, and smoking in the breezeways. This will improve litter and disturbances of tenants. Voted on and approved.

E. REVIEW OF 2012 BUDGET:

The budget was tabled to immediately follow additional discussion items. After discussing other issues, a motion was made, seconded, and approved to accept the 2012 budget as amended. The amendments were: \$5,000 for fencing, reduce landscaping to \$16,145, increase pool maintenance to \$4,800, clubhouse common area increased by \$1,500 to \$10,000 for concrete Repairs of \$1,500. Voted on and approved.

F. ANY ADDITIONAL ITEMS FOR DISCUSSION AND QUESTIONS

1. President Jon Kalsbeek explained that the sewer line from the clubhouse has 3 breaks in it due to improper installation. The board approved the repair of the line to where it meets the parking lot, which cost \$2,000. The 2012 budget includes an estimated \$7,000 to cut the parking lot and install new line to the city connection.
2. Additional discussion was made about repairing sidewalks and breezeways that had trip hazards. A study of the current gutter system may need to be made to see if the drainage near the entrance is the cause of the ground sinking and perhaps water should be diverted away from this area.
3. President Jon Kalsbeek explained that the builder did not properly secure the stairwells on some building, particularly the C model units. Modifications and repairs have been made to all units identified as needing this done.
4. President Kalsbeek stated that when the pool was winterized, it was identified that the heater was leaking. No bids have yet been received. It was discussed that if the repair is minor, they will go forward with the repair. If heater needs replaced, the board will look at considering a solar heating system. One member stated he knew about solar heating and would assist in this task.
5. A member asked how warranties were handled. Tony Drost with FRPM explained that the management software tracks warranties and flags the resident manager when a work order is generated for a warranty item.
6. FRPM to send a report to each owner showing outstanding tenant balances and where we are in collecting those funds.
7. President Kalsbeek explained that the developer is attempting to get the parcel of land located at 2045 E Overland Rd which is on the SW corner of Overland Rd and South Millennium Way rezoned which would allow a fast food or other business that may operate extended hours, create additional foot traffic from the high school, as well as litter, smells, etc. All property owners are

SAGECREST POA MEETING
OCTOBER 31, 2011

encouraged to attend the P&Z meeting at Meridian City Hall on November 15, 2011. For those out of town, it was encouraged that those owners submit a letter opposing the re-zoning to:

Meridian Planning and Zoning
Attn: Barbara Shiffer
Re: App CPAM11-002 Amendment by Jeffrey Hall
33 E Broadway, Suite 210
Meridian, ID 83642
208-884-5533
208-888-6854

8. It was discussed that any property owner that has questions concerning the POA should address those concerns directly to the board and not FRPM. In a few instances, the property owner went to FRPM who relayed the message to the POA Board who sent FRPM their reply that was forwarded back to the owner. This caused delays and issues with communication.

It was also discussed that FRPM at no charge to the POA look at creating a member login on a website where they can find pertinent information as well as a message board so that all members can communicate with one another.

G. ELECTION OF 2011 OFFICERS:

Nominations were made, followed by a motion, that was seconded, and passed to accept the slate of nominated officers.

Jon Kalsbeek	President
Jay Arla	Vice President
Chris Schwab	Secretary
David Meisner	Treasurer

H. ADJOURN:

Motion to adjourn and approved at 12:03pm.

10



Jennifer Yates <jlmyers.law@gmail.com>

Fwd: Late Pro-Rated Rent on Past Active Tenant - 4623

1 message

Matt Switzer <matt.switzer@ymail.com>
To: "jlmyers.law@gmail.com" <jlmyers.law@gmail.com>

Thu, Dec 5, 2013 at 7:39 PM

Sent from my iPhone

Begin forwarded message:

From: <Matt.Switzer@bankersfundingcompany.com>
Date: May 31, 2011 at 3:58:30 PM MDT
To: <sagecrest@FRPMRENTALS.COM>, <Marie@FRPMRENTALS.COM>
Cc: <Lizz@FRPMRENTALS.COM>, <Cathy@FRPMRENTALS.COM>, <Dawn@FRPMRENTALS.COM>, <Matt@FRPMRENTALS.COM>, <matt.switzer@ymail.com>
Subject: RE: Late Pro-Rated Rent on Past Active Tenant - 4623

Hello,

Please discontinue sending email to this address, and start using: matt.switzer@ymail.com
Thank You,

Matt Switzer
Mortgage Consultant
Bankers Funding Company, LLC
An Affiliate of Wells Fargo Home Mortgage
1400 N. Harbor Blvd., Suite 101
Fullerton, CA 92835
714-992-2141 Office
714-307-3959 Cell
866-640-9534 Fax
NMLS #675476
matt.switzer@bankersfundingcompany.com

Visit my website at: www.bankersfundingcompany.com/matt-switzer**** Please consider the environment before printing this document ****

This is an unsecured email service which is not intended for sending confidential or sensitive information. Please do not include your social security number, account number, or any other personal or financial information in the content of the email. This may be a promotional email. To discontinue receiving promotional emails from Bankers Funding Company, LLC, click here NoEmailRequest@homeloans.com. All first mortgage products are provided by Bankers Funding Company, LLC. Bankers Funding Company, LLC may not be available in your area. Wells Fargo Home Mortgage is a division of Wells Fargo Bank, N.A. All Rights Reserved. NMLSR ID 345183
Equal Housing Lender.

-Jared Heiner

--- On Wed, 11/9/11, Sagecrest <sagecrest@FRPMRENTALS.COM> wrote:

From: Sagecrest <sagecrest@FRPMRENTALS.COM>

Subject:

To: jaredheiner@yahoo.com, bcoopers6@yahoo.com, jay.arla@gmail.com,
eebecker1@tds.net, acampos94518@yahoo.com, bycappa@aol.com,
pursestrings@gmail.com, aire1@pacbell.net, matt.j.conner@gmail.com,
frank.deleo2@verizon.net, punitd1@gmail.com, mduffin@amalsugar.com,
jerryehlers@johnlscott.com, ronfacc@yahoo.com, hanoverholdings@gmail.com,
janet@parrfamily.com, cindyowen@q.com, amir.11@live.com, jpowell@digitallore.com,
wmraffdesigns@yahoo.com, Raffbeth@yahoo.com, krice@exwire.com,
paul.ryan@marcusmillichap.com, naisaechao0485@yahoo.com, cmschwab@aol.com,
Geneservatius@yahoo.com, calico2640@msn.com, grandmabj@aol.com,
matt.switzer@ymail.com, takatori1@frontier.com, carefreemgt@gmail.com,
lidetector60@hotmail.com, john.sonmez@gmail.com

Date: Wednesday, November 9, 2011, 12:44 PM

Attention Owners:

Several owners have asked what can be done to prevent the flooding problems associated with the heating/cooling systems at Sagecrest. Your association has been working diligently on a solution to help prevent the possible flooding of units from broken coils in the heating system and water heater failures. After much research and many discussions, preventative maintenance is recommended as the best solution to avoid potential problems.

1. Install freeze-stats on the A/C coils to prevent freezing of the water lines within the coils that provide heat during winter. Note: the coils freeze in the summer time from A/C unit icing. This install is done by an HVAC vendor and has been suggested several times in the past.

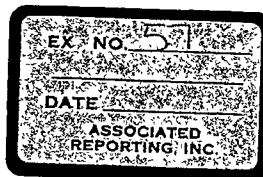
2. Install a PRV (Pressure Regulator Valve) on the main incoming water line to the building. Please view the attached quote for details of what is covered.

These are preventive maintenance items that owners are highly recommended to have done. The cost of losing a unit to flooding is greater than the installation of these items.

Below are the recommendations from the HVAC engineer to solving the CO problem in the units.

A. Increase the fresh air intakes for all floor plans

CONFIDENTIAL



FR03001
000228

by Adding louvers to the closet doors for ALL floor plans. \$187.50 per unit

B. Replace existing water heater with one that has side vents for ALL floor plans. \$650

C. Replace the smoke detectors with CO/Smoke detector combination sensor. \$62.48 per unit.

All of these recommended repairs are to help prevent the possibility of carbon monoxide entering the unit. These recommendations come from a report obtained by your association from a HVAC engineer evaluation.

Again, this work is highly recommended. Please let me know what you would like to have done and I can get that scheduled as soon as possible.

Tara Gaertner

Sagecrest Apartments

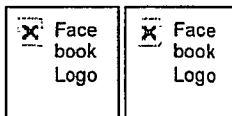
First Rate Property Management

P: (208) 514-4304

F: (208) 884-3487

<http://www.sagecrestapts.com/>

Become a Fan!



12



Jennifer Yates <jlmyers.law@gmail.com>

Fwd: Re:

1 message

Matt Switzer <matt.switzer@ymail.com>
To: jlmyers.law@gmail.com

Thu, Dec 5, 2013 at 8:36 PM

Sent from my iPhone

Begin forwarded message:

From: Matt Switzer <matt.switzer@ymail.com>
Date: November 9, 2011 at 3:21:34 PM MST
To: Sagecrest <sagecrest@FRPMRENTALS.COM>
Subject: Re:
Reply-To: Matt Switzer <matt.switzer@ymail.com>

11-9-11

Hi Tara,

I agree with #1 and #2, but can't find the quote attached. What is the cost to install freez-stats and a PRV at water main? I may already have had a PRV installed. I did not know we had a CO problem in the units. Would you let me know if my water heaters have a pressure release valve? The older models don't, but newer ones usually come with it. I'm not worried about a water heater with side vents due to cost.

I appreciate the heads up on these preventive maintenance measures. I'm trying to weigh costs vs benefits. Any help you can offer is appreciated. What is the general consensus among the other owners?

Sincerely,

Matt Switzer
714-307-3959

From: Sagecrest <sagecrest@FRPMRENTALS.COM>
To: jaredheiner@yahoo.com; bcoopers6@yahoo.com; jay.arla@gmail.com; eabecker1@tds.net; acampos94518@yahoo.com; bycappa@aol.com; pursestrings@gmail.com; aire1@pacbell.net; matt.j.conner@gmail.com; frank.deleo2@verizon.net; punitd1@gmail.com; mduffin@amalsugar.com; jerryehlers@johnlscott.com; ronfacc@yahoo.com; hanoverholdings@gmail.com; janet@parrfamily.com; cindyowen@q.com; amir.11@live.com;

Switzer000209

13

Unit #	Floor Plan	Aug-11	Nov-11	Mar-12	Jun-12	Sep-12
1011	C	8	1	10	0	0
1012	C	10	2	10	0	0
1023	C	11	4	14	0	0
1024	C	10	7	15	0	0
1111	A	4	3	15	0	0
1112	A	8	2	13	0	0
1123	A	18	2	6	0	0
1124	A	24	14	11	0	0
1311	C	14	18	Replaced, no test	0	0
1312	C	6	14	Replaced, no test	0	0
1323	C	4	12	15	0	0
1324	C	4	4	Replaced, no test	0	0
1511	C	8	8	Replaced, no test	0	0
1512	C	160	185	301	0	0
1523	C	14	1	24	0	0
1524	C	10	10	25	0	0
1611	A	10	14	Replaced, no test	0	0
1612	A	2200	16	Replaced, no test	0	0
1623	A	16	2	Replaced, no test	0	0
1624	A	18	20	Replaced, no test	0	0
1711	C	22	33	120	0	0
1712	C	10	12	15	0	0
1723	C	12	10	0	0	0
1724	C	6	14	Replaced, no test	0	0
1811	A	4400	18	Replaced, no test	0	0
1812	A	480	18	Replaced, no test	0	0
1823	A	2200	18	Replaced, no test	0	0
1824	A	2200	20	Replaced, no test	0	0
1911	C	10	12	21	0	0
1912	C	10	8	Replaced, no test	0	0
1923	C	10	10	29	0	0
1924	C	10	13	Replaced, no test	0	0
2011	A	11	16	27	0	0
2012	A	10	16	19	0	0
2023	A	11	14	17	0	0

2024	A	11	14	16	0	0
------	---	----	----	----	---	---

2111	A	10	12	8	0	0
2112	A	4	10	8	0	0
2123	A	10	10	21	0	0
2124	A	10	10	23	0	0

2211	C	0	14	17	0	0
2212	C	3	6	Replaced, no test	0	0
2223	C	8	14	7	0	0
2224	C	7	10	13	0	0

2311	C	650	0	Replaced, no test	0	0
2312	C	10	16	13	0	0
2323	C	14	26	6	0	0
2324	C	16	13	3	0	0

2511	C	6	20	6	0	0
2512	C	6	22	13	0	0
2523	C	8	8		0	0
2524	C	9	2	17	0	0

2611	C	8	26	35	0	0
2612	C	6	10	6	0	0
2623	C	10	20	1	0	0
2624	C	12	13	15	0	0

2711	A	2700	12	no test	0	0
2712	A	260	12	15	0	0
2723	A	2108	12	no test	0	0
2724	A	130	14	no test	0	0

2811	C	102	0	no test	0	0
2812	C	16	15	no test	0	0
2823	C	105	8	2	0	0
2824	C	110	23	11	0	0

2911	C	8	4	169	0	0
2912	C	43	10	36	0	0
2923	C	2200	0	no test	0	0
2924	C	37	8	no test	0	0

3011	B	23	18	11	0	0
3012	B	18	8	20	0	0
3023	B	70	90	563	0	0
3024	B	16	16	11	0	0

3111	C	2	10	30	0	0
3112	C	14	18	21	0	0
3123	C	1	10	30	0	0
3124	C	2	10	9	0	0

3211	C	23	13	9	0	0
3212	C	12	16	36	0	0
3223	C	14	18	28	0	0
3224	C	2222	14	no test	0	0

3311	A	2300	15	no test	0	0
3312	A	910	16	no test	0	0
3323	A	223	10	13	0	0
3324	A	12	17	23	0	0

3411	C	1200		no test	0	0
3412	C	23	18	25	0	0
3423	C	12	12	12	0	0
3424	C	2126	14	no test	0	0

3511	C	120	14	330	0	0
3512	C	104	4	15	0	0
3523	C	70	14	30	0	0
3524	C	12	10	11	0	0

3611	C	1		0	0	0
3612	C	2	13	28	0	0
3623	C	1		21	0	0
3624	C	2	10	7	0	0

3711	C	14	10	21	0	0
3712	C	19	22	no test	0	0
3723	C	6	14	0	0	0
3724	C	12	24	279	0	0

3811	C	6	16	10	0	0
3812	C	0	10	10	0	0
3823	C	2	12	10	0	0
3824	C	1	10	10	0	0

3911	B	6	10	34	0	0
3912	B	29	14	13	0	0
3923	B	550	22	8/3/2011	0	0
3924	B	18	2	1720	0	0

4011	C	17	16	11	0	0
4012	C	26	30	26	0	0

4023	C	18	16	32	0	0
4024	C	18	17	15	0	0

4111	A	20	13	35	0	0
4112	A	16	20	821	0	0
4123	A	2319	20	8/3/2011	0	0
4124	A	30	22	18	0	0

4211	C	2035	16	8/3/2011	0	0
4212	C	16	31	958	0	0
4223	C	8	31	50	0	0
4224	C	30	364	11/18/2011	0	0

4311	B	1	12	26	0	0
4312	B	2	14	22	0	0
4323	B	12	900	11/18/2011	0	0
4324	B	0	15	831	0	0

4411	A	2201	0	8/3/2011	0	0
4412	A	2200	0	8/3/2011	0	0
4423	A	No Gas	13	32	0	0
4424	A	450	2	8/3/2011	0	0

4511	A	150	8	26	0	0
4512	A	42	16	1775	0	0
4523	A	110	14	35	0	0
4524	A	94	12	3/7/2011	0	0

4611	B	18	22	100	0	0
4612	B	26	2	15	0	0
4623	B	8	12	1/7/2011	0	0
4624	B	32	0	100	0	0

4711	B	24	12	24	0	0
4712	B	2400	14	1/11/1900	0	0
4723	B	300	12	8/3/2011	0	0
4724	B	7	10	22	0	0

4811	A	10	9	31	0	0
4812	A	70	14	17	0	0
4823	A	300	14	13	0	0
4824	A	7	14	26	0	0

4911	A	13	3	70	0	0
4912	A	12	10	new	0	0
4923	A	12	12	13	0	0
4924	A	12	8	28	0	0

5011	B	2100	12	10	0	0
5012	B	350	14	11	0	0
5023	B	12	12	61	0	0
5024	B	450	14	0	0	0

5211	B	25	12	30	0	0
5212	B	18	12	6	0	0
5223	B	16	14	155	0	0
5224	B	8	14	7	0	0

5311	C	4	14	1	0	0
5312	C	6	8	8	0	0
5323	C	2082	8	15	0	0
5324	C	18	16	11	0	0

5411	C	47	16	11/2/2011	0	0
5412	C	27	15	43	0	0
5423	C	12	14	88	0	0
5424	C	16	12	30	0	0

5511	B	2180	14	15	0	0
5512	B	11	20	11	0	0
5523	B	2067	18	2	0	0
5524	B	18	12	20	0	0

5611	C	9	6	41	0	0
5612	C	16	22	22	0	0
5623	C	6	12	42	0	0
5624	C	111	13	2	0	0

5711	C	18	8	1/10/2012	0	0
5712	C	10	10	115	0	0
5723	C	6	15	11	0	0
5724	C	14	10	0	0	0

#58

Unit box that is purple= we don't manage this building



1805 E. Overland Rd., Bldg. 58 • Meridian, ID 83642 • (208) 514-4304 • Fax: (208) 884-3487

Check us out on the web at: www.sagecrestapts.com

IMPORTANT!

Upon our recent inspections of the water heaters at Sagecrest we have found that your unit shows higher levels of carbon monoxide than we would like to see. The carbon monoxide is exiting through the vent on top of the water heater but does have the potential of entering the unit. It is very important if you run your dryer to keep the bi-fold doors open at all times. We have provided carbon monoxide detectors for safety precautions until your water heater can be replaced next week. Please read the instructions so it is properly placed in your apartment and you are aware of how it operates. Please do not attach them to the walls since they will be picked up once your water heater is replaced. The owner of your property has been informed of the situation. They are scheduled for replacement starting on Monday until the job is complete. Please also consider this your notice of intent to enter for the replacement. We do not have a firm schedule of what units will be completed when but are trying our best to do them quickly. If the carbon monoxide detector goes off please open all windows and contact Intermountain Gas at 377-6840. For extra safety precautions it wouldn't hurt to sleep with a couple windows open. If you would like to shut your water heater off you may turn it to "vacation" but you will not have hot water. Please call if you have any further questions or concerns. Thank you for your understanding while we all work to get this matter resolved.

Sagecrest Apartments

Exh. No. 14
Date 10/25/13
Name Kipper
M & M Court Reporting

MPD000303

000239

15

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, et al.,)	
Plaintiffs,)	
vs.)	Case No. CV-PI-2013-04325
SAGECREST MULTI FAMILY PROPERTY)	
OWNERS' ASSOCIATION, INC., et al.,)	
Defendants.)	
_____)	

DEPOSITION OF ADRA KIPPER

OCTOBER 24, 2013

REPORTED BY:

ANDREA L. CHECK, CSR No. 748, RPR

Notary Public

Adra Kipper 10/24/2013

1 need a carbon monoxide detector.

2 Q. When did you get a notice from First Rate
3 regarding replacement of the water heater?

4 A. I can't recall the exact month or day, but it
5 was in the spring of 2012.

6 Q. And when you got this notice, did you have
7 concerns?

8 A. No, from the notice, it, basically, reassured
9 me that they were dealing with it and my water heater
10 and the concern that they had would be corrected within
11 the week.

12 Q. What was the problem with the water heater, to
13 your understanding?

14 A. I didn't understand it. I just assumed that
15 it was going to be handled.

16 Q. Were you having any problems with your water
17 heater prior to receiving this notice?

18 A. No.

19 Q. Then you had mentioned that -- something about
20 a carbon monoxide detector, that you thought there was a
21 need to get one?

22 A. They handed them -- handed one -- or provided
23 one to me at the same time that that notice went out.

24 Q. So in the spring of 2012?

25 A. I believe it's about that time.

Adra Kipper 10/24/2013

1 worked?

2 A. Exactly.

3 Q. Did you have any concerns with regard to the
4 emission of carbon monoxide when you received this
5 carbon monoxide detector?

6 A. Well, of course, you know, it concerned me,
7 but I was reassured by the message from management that
8 it would be resolved, you know, and they were taking the
9 precautions of having that carbon monoxide detector
10 added to the apartments -- or mine. I trusted that it
11 was not a concern anymore.

12 Q. When you say, "it," what is "it"?

13 A. The carbon monoxide concern.

14 Q. Did someone with First Rate tell you they had
15 a concern about carbon monoxide emissions?

16 A. The only thing I got from them was that notice
17 that was with my detector that showed up. That's the
18 only time that I was communicated with about that issue.

19 Q. Were you ever aware, while you lived there, of
20 the fire department being called on occasion to come to
21 the Sagecrest facility?

22 A. Not to my building.

23 Q. Were you aware that they were called, on
24 several occasions, to come to the Sagecrest Complex?

25 MR. ANDERSON: Form.

Adra Kipper 10/24/2013

1 Q. (BY MR. HAMAN) Were you aware of that?

2 A. No. I have no knowledge of any of that, other
3 than what happened and what I've heard about after.

4 Q. And I'll talk to you about that in a little
5 bit.

6 In the month of August 2011 -- so you'd been
7 there for approximately five months -- do you recall
8 someone saying they would come to your apartment, change
9 the air filter, and test for carbon monoxide?

10 A. No.

11 Q. Do you recall seeing any kind of a notice that
12 someone from First Rate or on behalf of First Rate would
13 come to the apartment and do any work in the summer of
14 2011 on the water heater?

15 A. No, I don't recall.

16 Q. Did anyone make you aware that your water
17 heater had ever tested positive for high emissions of
18 carbon monoxide?

19 MR. WALTERS: Objection; foundation.

20 MR. ANDERSON: Join.

21 MR. GREENER: Join.

22 Q. (BY MR. HAMAN) At the time you lived there,
23 do you have any personal knowledge as to whether or not
24 the water heater in that apartment tested for high
25 levels of carbon monoxide emissions?

Adra Kipper 10/24/2013

1 A. To my knowledge, no.

2 Q. Did anyone from First Rate or on behalf of
3 First Rate, to your knowledge, perform a carbon monoxide
4 test for emissions in your apartment while you lived
5 there?

6 A. Them specifically?

7 Q. Let's start with them specifically.

8 A. No.

9 Q. How about anyone who -- any contractors?

10 A. The only one I heard about was the
11 Intermountain Gas, which is what was listed on that
12 notice I got.

13 Q. Did Intermountain -- did an employee from
14 Intermountain Gas come to your apartment at any time
15 while you lived there, to your knowledge?

16 A. I was not there when they -- if they did show
17 up. From what I'm gathering, is that that's how they
18 tested it.

19 Q. Can you elaborate? "That's how they tested
20 it," what do you mean by that?

21 A. They tested the levels of my apartment.

22 Q. While you were not there?

23 A. Correct. I was definitely not there.

24 Q. Did anyone ever report to you what those
25 levels were?

Adra Kipper 10/24/2013

1 REPORTER'S CERTIFICATE

2 I, ANDREA L. CHECK, CSR No. 748, Certified
3 Shorthand Reporter, certify;

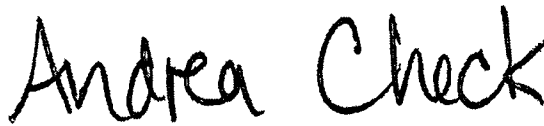
4 That the foregoing proceedings were taken
5 before me at the time and place therein set forth, at
6 which time the witness was put under oath by me;

7 That the testimony and all objections made
8 were recorded stenographically by me and transcribed by
9 me or under my direction;

10 That the foregoing is a true and correct
11 record of all testimony given, to the best of my
12 ability;

13 I further certify that I am not a relative or
14 employee of any attorney or party, nor am I financially
15 interested in the action.

16 IN WITNESS WHEREOF, I set my hand and seal
17 this 30th day of October, 2013.

18
19 
20

21 ANDREA L. CHECK, C.S.R. No. 748, R.P.R.

22 Notary Public

23 P.O. Box 2636

24 Boise, Idaho 83701-2636

25 My Commission expires July 20, 2016.

16

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)	
HYMAS, individually and as)	
the natural parents of)	
PRIVATE FIRST CLASS McQUEN C.)	
FORBUSH, USMC (Deceased),)	
and BREANNA HALOWELL,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. CV PI 1304325
)	
SAGECREST MULTIFAMILY PROPERTY)	
OWNERS' ASSOCIATION, INC., an)	
Idaho non-profit corporation,)	
d/b/a SAGECREST MULTIFAMILY)	
PROPERTY OWNERS' ASSOCIATION,)	
et al.,)	
)	
Defendants.)	
)	

DEPOSITION OF TARA GAERTNER

January 2 and 3, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

1 the -- or the deciding criteria in delivery of the
2 notice?

3 Was it the level of the CO testing?

4 A. Yes.

5 Q. Okay. And what was the -- what was the
6 level above a certain --

7 A. From --

8 Q. -- amount?

9 A. From what I recall, I believe
10 Intermountain Gas said anything above 50.

11 Q. Okay. So if I went down this March '12
12 list and saw an amount above 50, then that person
13 would have received the notice, Exhibit 14?

14 A. Yes.

15 Q. Okay. And you also talked about a
16 carbon monoxide detector that was delivered.

17 A. Yes.

18 Q. Okay. Regarding Exhibit 14, was there
19 any other notice sent to the tenant in 4624
20 regarding carbon monoxide?

21 A. Not that I can recall.

22 Q. Okay. Was the water heater in 4624
23 replaced before November 10th, 2012?

24 A. No.

25 Q. Have you ever spoken with Adra Kipper?

1 A. I believe Chris just changed the furnace
2 filter if it was dirty.

3 Q. Anything else?

4 A. Not to my knowledge.

5 Q. Do you ever recall having a conversation
6 with the tenant, Adra Kipper, about having too much
7 heat in this particular apartment unit?

8 MR. ANDERSON: Asked and answered.

9 THE WITNESS: No.

10 Q. (BY MS. MILLER) Do you ever recall
11 having any conversation with the tenant or anybody
12 else that the thermostat, after it was replaced,
13 which you already testified to, was not operating
14 properly?

15 A. No.

16 Q. If your counsel doesn't object, I'm
17 going to show you a couple of documents, look over
18 your shoulder and ask you a few questions.

19 MS. MILLER: Is that okay?

20 MR. ANDERSON: Come on down.

21 MS. MILLER: Thank you.

22 Q. (BY MS. MILLER) Okay. So the first
23 document I'm going to show you is Express Plumbing
24 Bates number 4 through 20.

25 I'll ask you, if you could, to ignore

1 the handwriting on it --

2 A. Okay.

3 Q. -- and the highlighting on the
4 documentation.

5 And I would just first ask you if you
6 even recognize that document, if you've ever seen
7 it before.

8 A. I mean, can I read it?

9 Q. Oh, absolutely.

10 A. Okay.

11 MR. ANDERSON: Put it over here.

12 THE WITNESS: Yes, this looks familiar.

13 Q. (BY MS. MILLER) And you can read my
14 question on there as well, which for you is: Did
15 you help write any portion of that document, to the
16 best of your knowledge?

17 A. I'm sorry. Let me read it real quick.

18 MR. PALMER: Are we going to go ahead and
19 mark that?

20 MS. MILLER: No.

21 THE WITNESS: I want to --

22 I -- I think Sheila wrote this.

23 Q. (BY MS. MILLER) And it does appear to be
24 authored by Sheila.

25 But do you recall whether you helped her

1 actual water heater, yes, it would have created a
2 work order.

3 Q. Okay. And if it wasn't the water heater
4 itself but just the area around the water heater --
5 say in the utility room it's kind of dirty, lint,
6 dryer sheets -- what would you have done about
7 that?

8 A. I don't know. I probably would have
9 cleaned it.

10 Q. You would have just come back later
11 and --

12 A. Probably, or I would have called the
13 tenants and said, "Hey, you need to clean this
14 area."

15 Q. Okay. Do you recall whether, after
16 Intermountain Gas came out on March 12th, you
17 contacted Express Plumbing and asked them to come
18 out and do any work on any of the water heaters?

19 MR. ANDERSON: Object to the form; lack of
20 foundation that any of this information was
21 transmitted.

22 THE WITNESS: I --

23 Q. (BY MS. WILLMAN) After you met with --
24 I'm not talking specifically about this
25 document. I'm just saying from what you remember

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 7th day of January, 2014.



Andrea J. Wecker
ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.

My Commission Expires: 2-14-17

On 3/22/2012 8:59 PM, Tony wrote:

Tara:

Are you all good with all of this stuff? From what I understand, we were doing it incorrectly.

Tony A. Drost, MPM®, RMP®



----- Forwarded Message -----

From: "Commerce Centre" <ccbusinessspark@gmail.com>

To: "Sheila" <sheila@frpmrentals.com>; "sagecrest"

<sagecrest@frpmrentals.com>; aire1@pacbell.net; "Lizz" <Lizz@frpmrentals.com>; "Tony Drost" <tony@frpmrentals.com>

Sent: 3/22/2012 8:44:48 PM

Subject: Re: Fw: Carbon Monoxide/ Testing procedures

Attached is a revised Water Heater - CO testing procedure which should help in clearing up any issues. Please review and comment. Thank you Sheila for working up the draft and details. Good meeting, Thanks

Will this work for you, Tara?



--- On **Wed, 3/21/12**, Sheila <sheila@frpmrentals.com> wrote:

From: Sheila <sheila@frpmrentals.com>

Subject: Carbon Monoxide/ Testing procedures

To: "sagecrest" <sagecrest@frpmrentals.com>, aire1@pacbell.net

Cc: "Lizz" <Lizz@frpmrentals.com>, "Tony Drost" <tony@frpmrentals.com>

Date: Wednesday, March 21, 2012, 1:04 PM

Attached is the paperwork Jon brought in regarding carbon monoxide. Below is what I have for the procedures:

Air filters are being changed monthly 10-12 buildings at a time starting next month. This will prevent overtime and spread the 3-4 day process out throughout the months.

During the filter changes the carbon monoxide detector is to be turned on and set somewhere in the room so the air can be tested while the filter is changed.

If the reading is 30 or above in the room a proper test must be done in the flue of the water heater. Be sure to turn on all hot water in the apartment so water heater can kick on and run for 5

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00255

minutes prior to testing the air in the flue.

If the air in the flue tests 100+ call the owner to discuss replacement. Follow up with an email for documentation. Install a carbon monoxide/fire detector combo if one isn't already present. If water heater isn't replaced conduct proper test in the flue in 30 days. Continue to do so every 30 days until water heater is replaced. Educate tenants.

If air in the flue tests 300+ contact owner and inform immediate water heater replacement is required. If owner refuses contact Intermountain Gas to come test and shut the water heater down if needed. If you are not able to get a hold of the owner and haven't received a response via phone or email within 24 hours contact Intermountain Gas to test and shut down. Follow up with email to the owner. Educate tenants.

Carbon monoxide/fire detector combos are to eventually be installed in every unit to replace the smoke detector in the hallway. This is to be done on turnovers, during preventative maintenance, lease renewals, or if smoke detector is faulty in a unit until each one has one.

Thanks,
Sheila Thomason
Maintenance Supervisor
First Rate Property Management
(208) 577-5201
(208) 321-1901 fax

--

From: 'Commerce Centre' <ccbusinesspark@gmail.com>
To: Sheila<sheila@frpmrentals.com>; sagecrest<sagecrest@frpmrentals.com>; aire1@pacbell.net<aire1@pacbell.net>; Lizz<Lizz@frpmrentals.com>; Tony Drost<tony@frpmrentals.com>
Sent: Thursday, March 22, 2012 8:44 PM
Attachments: WH testing Procedures-info-revised 3-2012.doc
Subject: Re: Fw: Carbon Monoxide/ Testing procedures

Attached is a revised Water Heater - CO testing procedure which should help in clearing up any issues. Please review and comment. Thank you Sheila for working up the draft and details. Good meeting, Thanks

Will this work for you, Tara?

Virginia and Jon

--- On Wed, 3/21/12, Sheila <sheila@frpmrentals.com> wrote:

From: Sheila <sheila@frpmrentals.com>
Subject: Carbon Monoxide/ Testing procedures
To: "sagecrest" <sagecrest@frpmrentals.com>, aire1@pacbell.net
Cc: "Lizz" <Lizz@frpmrentals.com>, "Tony Drost" <tony@frpmrentals.com>
Date: Wednesday, March 21, 2012, 1:04 PM

Attached is the paperwork Jon brought in regarding carbon monoxide. Below is what I have for the procedures:

Air filters are being changed monthly 10-12 buildings at a time starting next month. This will prevent overtime and spread the 3-4 day process out throughout the months.

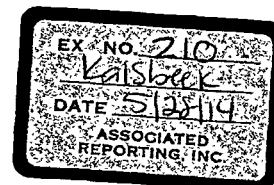
During the filter changes the carbon monoxide detector is to be turned on and set somewhere in the room so the air can be tested while the filter is changed. If the reading is 30 or above in the room a proper test must be done in the flue of the water heater. Be sure to turn on all hot water in the apartment so water heater can kick on and run for 5 minutes prior to testing the air in the flue.

If the air in the flue tests 100+ call the owner to discuss replacement. Follow up with an email for documentation. Install a carbon monoxide/fire detector combo if one isn't already present. If water heater isn't replaced conduct proper test in the flue in 30 days. Continue to do so every 30 days until water heater is replaced. Educate tenants.

If air in the flue tests 300+ contact owner and inform immediate water heater replacement is required. If owner refuses contact Intermountain Gas to come test and shut the water heater down if needed. If you are not able to get a hold of the owner and haven't received a response via phone or email within 24 hours contact Intermountain Gas to test and shut down. Follow up with email to the owner. Educate tenants.

Carbon monoxide/fire detector combos are to eventually be installed in every unit to replace the smoke detector in the hallway. This is to be done on turnovers, during

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FR00278

000257

preventative maintenance, lease renewals, or if smoke detector is faulty in a unit until each one has one.

Thanks,
Sheila Thomason
Maintenance Supervisor
First Rate Property Management
(208) 577-5201
(208) 321-1901 fax

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FR00279

000258

CARBON MONOXIDE PROCEDURES

Revised Date: March 20, 2012

Throughout this process, continued diligence is necessary to protect tenants safety and complex from possible hazardous conditions. Our goal is to have a safe and comfortable environment.

These procedures shall be followed for detecting CO (carbon monoxide) levels in units:

- A. Air filters shall be changed monthly; by 10-12 buildings at a time, starting April 2012
- B. During filter changes; the carbon monoxide detector testing unit shall be turned on prior to entering each unit, warmed up, and set to zero. Once in the unit, the tester shall be set on the kitchen counter sampling the air in the hall and living room.
- C. During the time of testing, the filter shall be changed, the area around the water heater inspected and cleaned-if necessary.
- D. Once the filter and water heater areas are completed, the tester shall be read. If the reading is below 30ppm, no further action is required.

Action required if:

- E. If the tester reading is 30ppm or above in the room- a proper test shall be conducted in the flue of the water heater. Be sure to turn on all hot water in the apartment so water heater can turn on and reach operating temperature, reset the tester to zero and make sure the water heater runs approximately 5 minutes prior to testing the air in the flue.
- F. If the air in the flue tests results in a reading between 100 and 300ppm, a note to call the owner shall be made to discuss replacement of the water heater. At the time of calling the owner, a follow up email for documentation shall be sent to the owner. At this time, a UL approved carbon monoxide/smoke detector combo shall be installed in the area of the hallway; unless one is already present. Should the owner elect not to change the water heater at this time, a second test shall be conducted on the water heater flue at operating temperature in 25 to 30 calendar days. Continue to do so every 25 to 30 calendar days until a safe condition exists-below 100ppm in the flue. Educate tenants. Should the water heater proper flue testing result in a higher reading than 300ppm at any time during this period, proceed to next step, G.
- G. If air in the flue tests 300ppm or above, note the reading, then, contact owner and inform immediate water heater replacement is required, followed up with an email for documentation. If owner refuses water heater replacement, advise owner Intermountain Gas is to be contacted so they can conduct a test of the unit. Should the results from this test be out of limits according to Intermountain Gas, a mandatory shutdown of the water heater will be done by the gas company. Should the owner not respond by phone or email within 24 hours of email notification, then, contact Intermountain Gas to conduct further testing. Educate tenants. At this point, a CO monitor shall be in place and operational, if one is not in place, install a CO/smoke monitor combo-UL approved in the hallway area.

Carbon monoxide/smoke detector combos are to eventually be installed in every unit by replacing the existing smoke detector currently in the hallway area. CO monitors shall be changed out or replace existing smoke detectors in the hallway area during -- turnovers, preventative maintenance, lease renewals, or faulty smoke detector - until complete. (Should a smoke detector fail in a bedroom, the existing unit in hallway area shall be moved to the bedroom, if operational, and a new carbon monoxide/smoke detector shall be installed in hallway area.)



Invoice

ANFINSON PLUMBING & MECHANICAL LLP
8201 W. PEMBROOK DR.
BOISE, ID 83704

Date	Invoice #
3/18/2009	82095

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #1712 MERIDIAN, ID 8367

Service Date	Problem Description	
3/18/2009	NO HEAT/HOT WATER	
Description		Amount
WATER HEATER SERVICE: REMOVE AND CLEAN BURNER ASSEMBLY. RUN THROUGH TWO HEAT CYCLES. **NOTE: CERAMIC DISC HAS BEEN COMPROMISED BUT IS STILL SAFE TO OPERATE: WILL NEED TO BE REPLACED.		110.00
Amount Due		\$110.00

Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cableone.net	www.anfinsonplumbingllp.com

DATE ORDERED	ORDER TAKEN BY
PHONE NO.	CUSTOMER ORDER #
JOB LOCATION	
JOB PHONE	STARTING DATE
TERMS	

TOTAL LABOR		
TOTAL MATERIALS		
TOTAL MISCELLANEOUS		
SUBTOTAL		
TAX		
GRAND TOTAL		



Invoice

ANFINSON PLUMBING & MECHANICAL LLP
8201 W. PEMBROOK DR.
BOISE, ID 83704

Date	Invoice #
3/23/2009	82101

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #5224 MERIDIAN, ID 8367

Service Date	Problem Description		
3/23/2009	WATER HEATER		
Description		Amount	
AFTER HOURS CALL: WATER HEATER NOT WORKING. WATER HEATER SERVICE: REMOVE AND CLEAN BURNER ASSEMBLY. REPLACE THERMOCOUPLE. RE-ASSEMBLE. RUN THROUGH TWO HEAT CYCLES. BOILER DRAIN WAS DRIPPING SLOWLY: TIGHTENED THE PACKING NUT AND LEAK STOPPED. ADVISED PROPERTY MANAGER TO KEEP AN EYE ON IT.		218.40	
Amount Due		\$218.40	
Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cablecone.net	www.anfinsonplumbingllp.com

Sage Crest 5224

3/22/09

Sunday morning, 10:15am, I received a call from Shirley saying that the water heater was out in appt. 5224. There was children living there and she requested that I come and fix it today.

I arrived at 10:45 and found that it was indeed not working, I pulled the burner assembly, used the vacuum to clean the combustion chamber, and I vacuumed underneath the water heater, while using the compressed air on the screen.

After it was cleaned I installed a new thermo coupler, and reassembled the water heater. I watched it through two heating cycles, and verified that it was working properly.

The boiler drain was dripping slowly; I tightened the packing nut, and turned it off another quarter turn. It seemed to stop, but I advised Shirley to keep an eye on it.

I left at 12:15pm



Invoice

ANFINSON PLUMBING & MECHANICAL LLP

8201 W. PEMBROOK DR.
BOISE, ID 83704

Date	Invoice #
3/24/2009	82102

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #5024 MERIDIAN, ID 8367

Service Date	Problem Description		
3/9/2009	HOT WATER HEATER		
Description		Amount	
SERVICE CALL: NO HOT WATER CHECKED WATER HEATER: CLEANED BURNER ASSEMBLY AND FAN COIL: RE LIGHT PILOT LIGHT AND RAN THROUGH TWO CYCLES. WORKING CORRECTLY AT THIS TIME		75.00	
Amount Due		\$75.00	
Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cableone.net	www.anfinsonplumbingllp.com

APM_00256
000266



Invoice

ANFINSON PLUMBING & MECHANICAL LLP

8201 W. PEMBROOK DR.

BOISE, ID 83704

Date	Invoice #
3/31/2009	82111

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #4523 MERIDIAN, ID 83642

Service Date	Problem Description
3/31/2009	WATER LEAK
Description	Amount
03/26/2009: AFTER HOURS CALL: WATER LEAKING FROM WATER HEATER FOUND BROKEN HYDRONIC COIL ASSEMBLY ON HEATING UNIT. WATER FLOODING OUT. SHUT VALVES OFF AND RECOMMENDED REPLACEMENT IMMEDIATELY.	82.50
03/27/2009: LABOR TO INSTALL NEW HYDRONIC COIL ASSEMBLY ON HEATING UNIT. MODEL # AH2429-1 REV-C SERIAL # 0407691858	300.00
**NOTE: PER HEATING REPRESENTATIVE, OLD HYDRONIC COIL SHOULD STILL BE UNDER INITIAL 5 YEAR WARRANTY. OLD COIL WAS TURNED IN ON 03/31/09 TO BE SHIPPED BACK TO FACTORY. IF FOR ANY REASON WARRANTY DOES NOT APPLY AND ADDITIONAL COST OF \$390.00 WILL BE DUE FOR COST OF COIL.	
Amount Due	\$382.50

Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cablecone.net	www.anfinsonplumbingllp.com



Heating Supply Company

Wholesalers of Air Conditioning • Heating Equipment • HVAC Supplies

Page: 1

Invoice

Boise

113 West 43rd Street
Boise, Idaho 83714
Phone: (208) 376-2332
FAX: (208) 375-4350

Idaho Falls

1875 N Holmes Avenue
Idaho Falls, Idaho 83401
Phone: (208) 522-0400
FAX: (208) 522-0549

INVOICE NUMBER: **0113330-IN**

ORDER NUMBER: 0080132

INVOICE DATE: 3/27/2009

SALESPERSON: 0003

CUSTOMER NO: 00-0000029

SOLD TO:

Anfinsion Plumbing
11220 Bass Lane
Caldwell, ID 83605

SHIP TO:

Anfinsion Plumbing
11220 Bass Lane
Caldwell, ID 83605

Invoiced By: _____

Delivered By: _____

Filed By: _____

CONFIRM TO: PETE

TRACKING NUMBERS:

CUSTOMER P.O.	WHS	JOB NAME/ADDRESS				TERMS	
SAGECREST	000	WATER COIL REPLACEMENT				Deduct \$5.67	If Paid by the 10th
ITEM NUMBER		UNIT	ORDERED	SHIPPED	BACK ORD	PRICE	AMOUNT
150-37970-00		1.5 - 2 Ton Hydronic Coil Assembly	EA	1	1	0	283.64
283.64							
WILL CALL AROUND 12:00 FRIDAY							

WILL CALL AROUND 12:00 FRIDAY

Model # AH2429-1 Rev-C
Serial # 0407691858

Owner:
Marguerite Owen
7644 Jordan Ave
Cunago Park CA

Unit address: 181 Me. *customer name*
model AH2429-1 REV-C

91303

Cindy Owen
938 9103 Rep

Risk of loss to merchandise passes at po should be made to carrier. A restocking 1.5% per month, which is an annual per. Purchaser agrees to pay all costs of coil must be returned with required paperwork

Serrab Should be written correctly
0407691858

Authorized Agent: _____

Net Invoice: 283.64

Freight: 0.00

Sales Tax: 17.02

Invoice Total: 300.66

Don or Scott 2332
376 2162



Heating Supply Company

Wholesalers of Air Conditioning • Heating Equipment • HVAC Supplies

Page: 1

Invoice

Boise

113 West 43rd Street
Boise, Idaho 83714
Phone: (208) 376-2332
FAX: (208) 375-4350

Idaho Falls

1875 N Holmes Avenue
Idaho Falls, Idaho 83401
Phone: (208) 522-0400
FAX: (208) 522-0549

INVOICE NUMBER: **0113330-IN**

ORDER NUMBER: 0080132

INVOICE DATE: 3/27/2009

SALESPERSON: 0003

CUSTOMER NO: 00-0000029

SOLD TO:

Anfinsion Plumbing
11220 Bass Lane
Caldwell, ID 83605

SHIP TO:

Anfinsion Plumbing
11220 Bass Lane
Caldwell, ID 83605

Invoiced By: _____

Delivered By: _____

Filed By: _____

CONFIRM TO: PETE

TRACKING NUMBERS:

CUSTOMER P.O.	WHS	JOB NAME/ADDRESS			TERMS		
SAGECREST	000	WATER COIL REPLACEMENT			Deduct \$5.67	If Paid by the 10th	
ITEM NUMBER		UNIT	ORDERED	SHIPPED	BACK ORD	PRICE	AMOUNT
150-37970-00	1.5 - 2 Ton Hydronic Coil Assembly	EA	1	1	0	283.64	283.64
WILL CALL AROUND 12:00 FRIDAY							

WILL CALL AROUND 12:00 FRIDAY

Model # AH2429-1 Rev-c
Serial # 0407691858

Owner:
Marguerite Owen
7644 Jordan Ave
Cunago Park CA

916303

Unit address: 1805 E Overland Rd #4523
Meridian ID 83642

Cindy Owen
938 9103 Rep

Risk of loss to merchandise passes at point of shipment. Claims for short or damaged merchandise should be made to carrier. A restocking charge will be made on returned goods. A service charge of 1.5% per month, which is an annual percentage rate of 18%, will be made on past due accounts. Purchaser agrees to pay all costs of collection, including reasonable attorneys' fees. Warranty parts must be returned with required paperwork within 30 days of purchase to be eligible for credit.

Net Invoice: 283.64

Freight: 0.00

Sales Tax: 17.02

Invoice Total: 300.66

Authorized Agent: _____

① On 11. Sept 2332
370 2002
8581691858
Satz 1
Scheid. d.
Wid. d.
R.H. 2429-1 REV-C
Model
Liste aller Namen

JOB INVOICE

TO	SageCrest Hill properties
ADDRESS	415, 23
ATTENTION	

DATE ORDERED	ORDER TAKEN BY
PHONE NO.	CUSTOMER ORDER #
JOB LOCATION	
JOB PHONE	STARTING DATE
TERMS	

QTY	MATERIAL	UNIT	AMOUNT	DESCRIPTION OF WORK
	Water Leaking from within Fan Coil			Water Leaking from WH
	Recommend Replacement of Fan Coil			Fancoil Leaking shut valves To and from fancoil
MISCELLANEOUS CHARGES				
Go ahead				
	390.00			
	260.00	3.00 Labor		
	360.00			
	650.86			
	690.00			
	390.86			
	coil only 305.00			
LABOR	HRS	RATE	AMOUNT	
overtime	1			

WORK ORDERED BY
DATE ORDERED
DATE COMPLETED

CUSTOMER APPROVAL
SIGNATURE _____

AUTHORIZED SIGNATURE _____

TOTAL LABOR	
TOTAL MATERIALS	
TOTAL MISCELLANEOUS	
SUBTOTAL	
TAX	
GRAND TOTAL	



Invoice

ANFINSON PLUMBING & MECHANICAL LLP

8201 W. PEMBROOK DR.

BOISE, ID 83704

Date	Invoice #
4/3/2009	82122

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #4512 MERIDIAN, ID 83642

Service Date	Problem Description		
4/2/2009	HOT WATER HEATER		
Description		Amount	
WATER HEATER SERVICE: REMOVE AND CLEAN BURNER ASSEMBLY. RE-ASSEMBLE. RUN THROUGH TWO HEAT CYCLES. WORKING CORRECTLY AT THIS TIME		122.95	
		Amount Due \$122.95	
Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cableone.net	www.anfinsonplumbingllp.com

APM 00263
000273-

Invoice

ANFINSON PLUMBING & MECHANICAL LLP

8201 W. PEMBROOK DR.

BOISE, ID 83704

Date	Invoice #
4/9/2009	81437

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #4512 MERIDIAN, ID 83642

Service Date	Problem Description		
4/9/2009			
Description	Amount		
WATER SIPHON COLD THROUGH FAN COIL: ADDED CHECK VALVE ON RETURN FROM FAN COIL. WORKING CORRECTLY AT THIS TIME.	180.77		
Amount Due	\$180.77		
Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cableone.net	www.anfinsonplumbingllp.com

APM_00265
000275



Invoice

ANFINSON PLUMBING & MECHANICAL LLP
8201 W. PEMBROOK DR.
BOISE, ID 83704

Date	Invoice #
4/15/2009	81611

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #3524 MERIDIAN, ID 83642

Service Date	Problem Description		
4/14/2009	LOW TEMP HOT WATER		
Description		Amount	
LOW TEMPERATURE HOT WATER: INSTALL CHECK VALVE AT WATER HEATER ON FAN COIL RETURN.		125.77	
Amount Due		\$125.77	
Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cableone.net	www.anfinsonplumbingllp.com

JOB INVOICE

APM_00267
000277



Invoice

ANFINSON PLUMBING & MECHANICAL LLP

8201 W. PEMBROOK DR.
BOISE, ID 83704

Date	Invoice #
4/15/2009	81612

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #3311 MERIDIAN, ID 83642

Service Date	Problem Description	
4/14/2009	LOW HOT WATER TEMP	
Description		Amount
LOW TEMPERATURE HOT WATER: INSTALL CHECK VALVE AT WATER HEATER ON FAN COIL RETURN.		125.77
Amount Due		\$125.77

Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cablecone.net	www.anfinsonplumbingllp.com

JOB INVOICE

TO	H3H Properties	DATE ORDERED	14 Apr 09	ORDER TAKEN BY	
ADDRESS	33, 11 Sage Crest	PHONE NO.		CUSTOMER ORDER #	
		JOB LOCATION			
ATTENTION		JOB PHONE		STARTING DATE	
		TERMS			

[illegible]

WORK ORDERED BY
DATE ORDERED
DATE COMPLETED

CUSTOMER APPROVAL
SIGNATURE _____

AUTHORIZED SIGNATURE _____

TOTAL LABOR		
TOTAL MATERIALS		
TOTAL MISCELLANEOUS		
SUBTOTAL		
TAX		
GRAND TOTAL		



Invoice

ANFINSON PLUMBING & MECHANICAL LLP
8201 W. PEMBROOK DR.
BOISE, ID 83704

Date	Invoice #
4/15/2009	81614

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #3012 MERIDIAN, ID 83642

Service Date	Problem Description		
4/15/2009	NO HOT WATER		
Description		Amount	
WATER HEATER SERVICE: REMOVE AND CLEAN BURNER ASSEMBLY. REPLACE THERMOCOUPLE. RE-ASSEMBLE. RUN THROUGH TWO HEAT CYCLES.		177.15	
		Amount Due \$177.15	
Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cablecone.net	www.anfinsonplumbingllp.com

APM_00271
000281

**ANFINSON PLUMBING & MECHANICAL LLP**

8201 W. PEMBROOK DR.
BOISE, ID 83704

Bill To

H & H PROPERTIES
520 S. ORCHARD
BOISE, ID 83705

Invoice

Date	Invoice #
4/27/2009	81636

Service Address

1805 E. OVERLAND RD., #4624
MERIDIAN, ID 83642

Service Date	Problem Description	
4/20/2009	NO HOT WATER	
Description		Amount
WATER HEATER SERVICE: REMOVE AND CLEAN BURNER ASSEMBLY. REPLACE THERMOCOUPLE. RE-ASSEMBLE. RUN THROUGH TWO HEAT CYCLES.		177.15
Amount Due		\$177.15
Phone #	Fax #	E-mail
208-321-4782	208-658-1844	anfinsonplm@cablecone.net
		Web Site
		www.anfinsonplumbingllp.com



pd

Invoice

ANFINSON PLUMBING & MECHANICAL LLP
8201 W. PEMBROOK DR.
BOISE, ID 83704

Date	Invoice #
4/27/2009	81636

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #2624 MERIDIAN, ID 83642

Service Date	Problem Description		
4/20/2009	NO HOT WATER		
Description		Amount	
REPLACE THERMOCOUPLE. MATERIAL ONLY - N/C FOR LABOR		27.00	
Amount Due		\$27.00	

Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cablecone.net	www.anfinsonplumbingllp.com

JOB INVOICE

TO *H:H properties*
ADDRESS *46-24 Sage Crest*
ATTENTION

DATE ORDERED 4/20/89	ORDER TAKEN BY
PHONE NO.	CUSTOMER ORDER #
JOB LOCATION	
JOB PHONE	STARTING DATE
TERMS	

[illegible]

WORK ORDERED BY
DATE ORDERED
DATE COMPLETED

CUSTOMER APPROVAL
SIGNATURE _____

AUTHORIZED SIGNATURE _____

TOTAL LABOR		
TOTAL MATERIALS		
TOTAL MISCELLANEOUS		
SUBTOTAL		
TAX		
GRAND TOTAL		



Invoice

ANFINSON PLUMBING & MECHANICAL LLP
8201 W. PEMBROOK DR.
BOISE, ID 83704

Date	Invoice #
5/8/2009	81654

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #4712 MERIDIAN, ID 83642

Service Date	Problem Description		
5/6/2009	WATER LEAK		
Description		Amount	
WATER LEAK @ WATER HEATER: CONDENSATE LINE HAD REVERSE GRADE AND WATER WAS RUNNING OUT OF THE PIPE ONTO THE FLOOR. INSTALLED 3/4" PVC 90 TO REVERSE GRADE.		112.50	
		Amount Due \$112.50	
Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cableone.net	www.anfinsonplumbingllp.com

Colleen Brown

From: Peter Anfinson [anfinsonplm@cableone.net]
Sent: Thursday, May 07, 2009 10:29 AM
To: 'Colleen Brown'
Subject: FW: Pay Stub from ANFINSON PLUMBING LLP



Pete Anfinson
Anfinson Plumbing & Mechanical
8201 W. Pembroke Dr.
Boise, ID 83704
208-321-4782 - Office
208-658-1844 - Fax

From: tobin shadwick [mailto:mad-dar@hotmail.com]
Sent: Thursday, May 07, 2009 10:20 AM
To: ANFINSON PLUMBING LLP
Subject: RE: Pay Stub from ANFINSON PLUMBING LLP

Here is the info for 5-6-2009

H&H 47-12

condensate line had reverse grade and water was running of the pipe on to the floor. The line had no 90 on it.

1.5 hours and I used one 3/4 pvc 90

Go to www.brdhunting.org for your next hunting dog

> Date: Wed, 6 May 2009 08:54:10 -0700
> From: anfinsonplm@cableone.net
> To: mad-dar@hotmail.com
> Subject: Pay Stub from ANFINSON PLUMBING LLP
>
> Dear TOBIN SHADWICK :
>
> Your pay stub is attached.
>
> Sincerely,
>
> ANFINSON PLUMBING LLP
> 208-321-4782

Windows Live™: Keep your life in sync. [Check it out.](#)

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 8.5.325 / Virus Database: 270.12.21/2102 - Release Date: 05/07/09 05:57:00



Invoice

ANFINSON PLUMBING & MECHANICAL LLP

**8201 W. PEMBROOK DR.
BOISE, ID 83704**

Date	Invoice #
5/21/2009	81677

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #5511 MERIDIAN, ID 83642

Service Date	Problem Description	
5/20/2009	NOISE IN WALL	
Description		Amount
SERVICE CALL: TENANT STATES THAT THEY HAVE A "NOISE" IN THE WALL AND IT WOULD LAST FOR HOURS. TALKING WITH TENANT, THE NOISE SOUNDS LIKE WATER HAMMERING IN THE WALL. CHECKED ALL VISIBLE PIPING. CHECKED FOR WATER LEAKING FROM WALL. RAN WATER TO TRY TO GET NOISE TO REPRODUCE. COULD NOT FIND A CAUSE FOR THE NOISE OR GET THE NOISE TO REPRODUCE. INFORMED TENANTS TO WATCH AND LISTEN AND TO CALL IF NOISE STARTED AGAIN.		75.00
Amount Due		\$75.00

Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cablecone.net	www.anfinsonplumbingllp.com

Colleen Brown

From: tobin shadwick [mad-dar@hotmail.com]
Sent: Wednesday, May 20, 2009 2:44 PM
To: colleenbrown@cableone.net

5-20-2009

H&H

Sagecrest

unite 55-11

Was called to unite for a noise in the wall, ternate said it would last for hours.

I could not determine what was causing the noise. I believe it to be water hammering but could not get the noise to reproduce.

Tobin 1.0

Go to www.brdhunting.org for your next hunting dog

Windows Live™: Keep your life in sync. [Check it out.](#)

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 8.5.339 / Virus Database: 270.12.35/2124 - Release Date: 05/20/09 06:22:00



Invoice

ANFINSON PLUMBING & MECHANICAL LLP

8201 W. PEMBROOK DR.
BOISE, ID 83704

Date	Invoice #
5/21/2009	81678

Bill To
H & H PROPERTIES 520 S. ORCHARD BOISE, ID 83705

Service Address
1805 E. OVERLAND RD., #4924 MERIDIAN, ID 83642

Service Date	Problem Description	
5/20/2009	NO HOT WATER	
Description		Amount
WATER HEATER SERVICE: RE-LIGHT PILOT LIGHT: REMOVE AND CLEAN BURNER ASSEMBLY AND SCREEN. CLEANED OUT BOTTOM OF WATER HEATER. RE-ASSEMBLE. RUN THROUGH TWO HEAT CYCLES.		165.00
Amount Due		\$165.00

Phone #	Fax #	E-mail	Web Site
208-321-4782	208-658-1844	anfinsonplm@cableone.net	www.anfinsonplumbingllp.com

A FDID * 01313 E000000 - 1110 10 2012 State * Incident Date *		MM YYYY Station M34 Incident Number 12-0004008 Exposure * 000		<input type="checkbox"/> Delete <input type="checkbox"/> Change <input type="checkbox"/> No Activity		NFIRS -1 Basic	
B Location* <input type="checkbox"/> Check this box to indicate that the address for this incident is provided on the Wildland Fire Module in Section B "Alternative Location Specification". Use only for Wildland fires.							
<input checked="" type="checkbox"/> Street address 1805 E OVERLAND RD Number/Milepost Prefix Street or Highway Street Type Suffix <input type="checkbox"/> Intersection <input type="checkbox"/> In front of <input type="checkbox"/> Rear of #3324 Meridian ID 83642 Apt./Suite/Room City State Zip Code <input type="checkbox"/> Adjacent to <input type="checkbox"/> Directions Cross street or directions, as applicable							
C Incident Type * 424 Carbon monoxide incident Incident Type		E1 Date & Times Midnight is 0000 Check boxes if dates are the same as Alarm Date. Alarm * 10 10 2012 08:18:06 ARRIVAL required, unless canceled or did not arrive <input type="checkbox"/> Arrival * 10 10 2012 08:22:00 CONTROLLED Optional, Except for wildland fires <input type="checkbox"/> Controlled LAST UNIT CLEARED, required except for wildland fires <input type="checkbox"/> Last Unit <input type="checkbox"/> Cleared 10 10 2012 09:22:20				E2 Shift & Alarms Local Option <input type="checkbox"/> B 34C Shift or Alarms District Platoon	
D Aid Given or Received* 1 <input type="checkbox"/> Mutual aid received 2 <input type="checkbox"/> Automatic aid recv. 3 <input type="checkbox"/> Mutual aid given 4 <input type="checkbox"/> Automatic aid given 5 <input type="checkbox"/> Other aid given N <input checked="" type="checkbox"/> None		E3 Special Studies Local Option Special Study ID# Special Study Value					
F Actions Taken * 86 Investigate Primary Action Taken (1) Additional Action Taken (2) Additional Action Taken (3)		G1 Resources * <input checked="" type="checkbox"/> Check this box and skip this section if an Apparatus or Personnel form is used. Apparatus Personnel Suppression 0002 0007 EMS Other <input type="checkbox"/> Check box if resource counts include aid received resources.		G2 Estimated Dollar Losses & Values LOSSES: Required for all fires if known. Optional for non fires. None Property \$ 000,000 Contents \$ 000,000 PRE-INCIDENT VALUE: Optional Property \$ 000,000 Contents \$ 000,000			
Completed Modules <input type="checkbox"/> Fire-2 <input type="checkbox"/> Structure-3 <input type="checkbox"/> Civil Fire Cas.-4 <input type="checkbox"/> Fire Serv. Cas.-5 <input checked="" type="checkbox"/> EMS-6 <input type="checkbox"/> HazMat-7 <input type="checkbox"/> Wildland Fire-8 <input checked="" type="checkbox"/> Apparatus-9 <input checked="" type="checkbox"/> Personnel-10 <input type="checkbox"/> Arson-11		H1*Casualties <input type="checkbox"/> None Deaths Injuries Fire Service Civilian H2 Detector Required for Confined Fires. 1 <input type="checkbox"/> Detector alerted occupants 2 <input type="checkbox"/> Detector did not alert them U <input type="checkbox"/> Unknown		H3 Hazardous Materials Release N <input type="checkbox"/> None 1 <input type="checkbox"/> Natural Gas: slow leak, no evacuation or HazMat actions 2 <input type="checkbox"/> Propane gas: <21 lb. tank (as in home BBQ grill) 3 <input type="checkbox"/> Gasoline: vehicle fuel tank or portable container 4 <input type="checkbox"/> Kerosene: fuel burning equipment or portable storage 5 <input type="checkbox"/> Diesel fuel/fuel oil: vehicle fuel tank or portable 6 <input type="checkbox"/> Household solvents: home/office spill, cleanup only 7 <input type="checkbox"/> Motor oil: from engine or portable container 8 <input type="checkbox"/> Paint: from paint cans totaling < 55 gallons 0 <input type="checkbox"/> Other: Special HazMat actions required or spill > 55gal., Please complete the HazMat form		I Mixed Use Property NN <input type="checkbox"/> Not Mixed 10 <input type="checkbox"/> Assembly use 20 <input type="checkbox"/> Education use 33 <input type="checkbox"/> Medical use 40 <input type="checkbox"/> Residential use 51 <input type="checkbox"/> Row of stores 53 <input type="checkbox"/> Enclosed mall 58 <input type="checkbox"/> Bus. & Residential 59 <input type="checkbox"/> Office use 60 <input type="checkbox"/> Industrial use 63 <input type="checkbox"/> Military use 65 <input type="checkbox"/> Farm use 00 <input type="checkbox"/> Other mixed use	
J Property Use* Structures 131 <input type="checkbox"/> Church, place of worship 161 <input type="checkbox"/> Restaurant or cafeteria 162 <input type="checkbox"/> Bar/Tavern or nightclub 213 <input type="checkbox"/> Elementary school or kindergarten 215 <input type="checkbox"/> High school or junior high 241 <input type="checkbox"/> College, adult education 311 <input type="checkbox"/> Care facility for the aged 331 <input type="checkbox"/> Hospital		341 <input type="checkbox"/> Clinic, clinic type infirmary 342 <input type="checkbox"/> Doctor/dentist office 361 <input type="checkbox"/> Prison or jail, not juvenile 419 <input type="checkbox"/> 1-or 2-family dwelling 429 <input checked="" type="checkbox"/> Multi-family dwelling 439 <input type="checkbox"/> Rooming/boarding house 449 <input type="checkbox"/> Commercial hotel or motel 459 <input type="checkbox"/> Residential, board and care 464 <input type="checkbox"/> Dormitory/barracks 519 <input type="checkbox"/> Food and beverage sales		539 <input type="checkbox"/> Household goods, sales, repairs 579 <input type="checkbox"/> Motor vehicle/boat sales/repair 571 <input type="checkbox"/> Gas or service station 599 <input type="checkbox"/> Business office 615 <input type="checkbox"/> Electric generating plant 629 <input type="checkbox"/> Laboratory/science lab 700 <input type="checkbox"/> Manufacturing plant 819 <input type="checkbox"/> Livestock/poultry storage (barn) 882 <input type="checkbox"/> Non-residential parking garage 891 <input type="checkbox"/> Warehouse 936 <input type="checkbox"/> Vacant lot 938 <input type="checkbox"/> Graded/care for plot of land 946 <input type="checkbox"/> Lake, river, stream 951 <input type="checkbox"/> Railroad right of way 960 <input type="checkbox"/> Other street 961 <input type="checkbox"/> Highway/divided highway 962 <input type="checkbox"/> Residential street/driveway			
Outside 124 <input type="checkbox"/> Playground or park 655 <input type="checkbox"/> Crops or orchard 669 <input type="checkbox"/> Forest (timberland) 807 <input type="checkbox"/> Outdoor storage area 919 <input type="checkbox"/> Dump or sanitary landfill 931 <input type="checkbox"/> Open land or field		981 <input type="checkbox"/> Construction site 984 <input type="checkbox"/> Industrial plant yard Lookup and enter a Property Use code only if you have NOT checked a Property Use box: Property Use 429 Multifamily dwelling					

K1 Person/Entity Involved

Local Option

Business name (if applicable)

Area Code

Phone Number

☒ Check this box if same address as incident location. Then skip the three duplicate address lines.

Mr., Ms., Mrs. First Name

Molly

MI

Last Name

Collins

Suffix

Number

Prefix

Street or Highway

Street Type

Suffix

Post Office Box

Apt./Suite/Room

City

Meridian

ID

83642

State

Zip Code

☐ More people involved? Check this box and attach Supplemental Forms (NFIRS-1S) as necessary

K2 Owner

☐ Same as person involved? Then check this box and skip the rest of this section.

Local Option

Business name (if Applicable)

Area Code

Phone Number

☐ Check this box if same address as incident location. Then skip the three duplicate address lines.

Mr., Ms., Mrs. First Name

MI

Last Name

Suffix

Number

Prefix

Street or Highway

Street Type

Suffix

Post Office Box

Apt./Suite/Room

City

State

Zip Code

L Remarks

Local Option

10/10/2012 19:26:37 Tim Kelley

On 10/10/2012 at 08:18:06 dispatched To 1805 E OVERLAND RD /#3324/Meridian, ID 83642. The location is a Multifamily dwelling. The incident was determined to be a(n) Carbon monoxide incident.

08:28:44 arrived on scene.

The following actions were performed on scene:

E34 responded to a report of a CO alarm sounding in the residence above. Upon arrival E34 met with the occupant who stated the alarm was going off, and that this was an on going issue. T31 arrived to bring a CO detector to the scene (E34 4 gas monitor is OOS). E34 made entry with the 4gas monitor which quickly alarmed. Highest reading was 92ppm. [REDACTED] requested Intermountain Gas, and BC31. The adjacent apartment was checked, no problem found. All HVAC units were apartment specific. IMG arrived and was briefed as was BC31. The problem was found to be likely a clogged vent to the hot water heater. IMG was to red tagged the unit. The complex manager (Tara Gaertner) was notified and briefed. The scene was turned over to Chief Palmer for follow up.

Units responding were:

Unit E31 responded.

Unit E34 responded.

Unit T31 responded.

09:22:20 all units back in service.

Authorization

M3390

Officer in charge ID

Kelley, Tim

Signature

CAPT

Position or rank

Assignment

10

Month

10

Day

2012

Year

check

ox if

ane

= Officer

n charge.

☒ M3390

Officer Member making report ID

Kelley, Tim

Signature

CAPT

Position or rank

Assignment

10

Month

10

Day

2012

Year

01313	ID	MM	10	10	YYYY	2012	M34	12-0004008	000	Complete Narrative
FDID *	State *	Incident Date *					Station	Incident Number *	Exposure *	

Narrative:

10/10/2012 19:26:37 Tim Kelley

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Unit E31 responded.

Unit E34 responded.

Unit T31 responded.

09:22:20 all units back in service.

MFD - 000005

A		FDID: <u>01313</u> *		State: <u>ID</u> *		Incident Date: <u>10</u> <u>10</u> <u>2012</u> *		Station: <u>M34</u>		Incident Number: <u>12-0004008</u> *		Exposure: <u>000</u> *		<input type="checkbox"/> Delete <input type="checkbox"/> Change		NFIRS - 9 Apparatus or Resources	

B. Apparatus or * Resource		Date and Times					Sent <input checked="" type="checkbox"/>	Number of * People	Use <small>Check ONE box for each apparatus to indicate its main use at the incident.</small>	Actions Taken	
		Check if same as alarm date									
		Month	Day	Year	Hour	Min					
<u>1</u>	ID <u>E34</u> Type <u>11</u>	Dispatch <input type="checkbox"/>	<u>10</u>	<u>10</u>	<u>2012</u>	<u>08:18</u>	<input checked="" type="checkbox"/>	<u>3</u>	<input checked="" type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<u> </u>	<u> </u>
		Arrival <input type="checkbox"/>	<u>10</u>	<u>10</u>	<u>2012</u>	<u>08:22</u>	<input checked="" type="checkbox"/>			<u> </u>	<u> </u>
		Clear <input type="checkbox"/>	<u>10</u>	<u>10</u>	<u>2012</u>	<u>09:22</u>				<u> </u>	<u> </u>
<u>2</u>	ID <u>T31</u> Type <u>12</u>	Dispatch <input type="checkbox"/>	<u>10</u>	<u>10</u>	<u>2012</u>	<u>08:20</u>	<input checked="" type="checkbox"/>	<u>4</u>	<input checked="" type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<u> </u>	<u> </u>
		Arrival <input type="checkbox"/>	<u>10</u>	<u>10</u>	<u>2012</u>	<u>08:28</u>	<input checked="" type="checkbox"/>			<u> </u>	<u> </u>
		Clear <input type="checkbox"/>	<u>10</u>	<u>10</u>	<u>2012</u>	<u>08:39</u>				<u> </u>	<u> </u>
<u>3</u>	ID <u> </u> Type <u> </u>	Dispatch <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>	<u> </u>	<input type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<u> </u>	<u> </u>
		Arrival <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>			<u> </u>	<u> </u>
		Clear <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>				<u> </u>	<u> </u>
<u>4</u>	ID <u> </u> Type <u> </u>	Dispatch <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>	<u> </u>	<input type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<u> </u>	<u> </u>
		Arrival <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>			<u> </u>	<u> </u>
		Clear <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>				<u> </u>	<u> </u>
<u>5</u>	ID <u> </u> Type <u> </u>	Dispatch <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>	<u> </u>	<input type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<u> </u>	<u> </u>
		Arrival <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>			<u> </u>	<u> </u>
		Clear <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>				<u> </u>	<u> </u>
<u>6</u>	ID <u> </u> Type <u> </u>	Dispatch <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>	<u> </u>	<input type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<u> </u>	<u> </u>
		Arrival <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>			<u> </u>	<u> </u>
		Clear <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>				<u> </u>	<u> </u>
<u>7</u>	ID <u> </u> Type <u> </u>	Dispatch <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>	<u> </u>	<input type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<u> </u>	<u> </u>
		Arrival <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>			<u> </u>	<u> </u>
		Clear <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>				<u> </u>	<u> </u>
<u>8</u>	ID <u> </u> Type <u> </u>	Dispatch <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>	<u> </u>	<input type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<u> </u>	<u> </u>
		Arrival <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>			<u> </u>	<u> </u>
		Clear <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>				<u> </u>	<u> </u>
<u>9</u>	ID <u> </u> Type <u> </u>	Dispatch <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>	<u> </u>	<input type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<u> </u>	<u> </u>
		Arrival <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>	<input type="checkbox"/>			<u> </u>	<u> </u>
		Clear <input type="checkbox"/>	<u> </u>	<u> </u>	<u> </u>	<u> </u>				<u> </u>	<u> </u>

Type of Apparatus or Resources

Ground Fire Suppression

11 Engine

12 Truck or aerial

13 Quint

14 Tanker & pumper combination

16 Brush truck

17 ARF (Aircraft Rescue and Firefighting)

10 Ground fire suppression, other

Heavy Ground Equipment

21 Dozer or plow

22 Tractor

24 Tanker or tender

20 Heavy equipment, other

Aircraft

41 Aircraft: fixed wing tanker

42 Helitanker

43 Helicopter

40 Aircraft, other

Marine Equipment

51 Fire boat with pump

52 Boat, no pump

50 Marine apparatus, other

Support Equipment

61 Breathing apparatus support

62 Light and air unit

60 Support apparatus, other

Medical & Rescue

71 Rescue unit

72 Urban Search & rescue unit

73 High angle rescue unit

75 BLS unit

76 ALS unit

70 Medical and rescue unit, other

More Apparatus?

Use Additional
Sheets

Other

91 Mobile command post

92 Chief officer car

93 HazMat unit

94 Type 1 hand crew

95 Type 2 hand crew

99 Privately owned vehicle

00 Other apparatus/resource

NN None

UU Undetermined

NFIRS-9 Revision 11/17/98

A		FDID * 01313		State * ID		Incident Date * MM 10 10 YYYY 2012		Station * M34		Incident Number * 12-0004008		Exposure * 000		<input type="checkbox"/> Delete <input type="checkbox"/> Change		NFIRS - 10 Personnel	
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B' Apparatus or Resource <small>Use codes listed below</small>		Date and Times <small>Check if same as alarm date</small>				Sent <input checked="" type="checkbox"/>		Number of * People		Use <small>Check ONE box for each apparatus to indicate its main use at the incident.</small>		Actions Taken <small>List up to 4 actions for each apparatus and each personnel.</small>	
		<small>Month Day Year Hours/mins</small>											

1	ID E34	Dispatch <input type="checkbox"/>	10	10	2012	08:18	Sent <input checked="" type="checkbox"/>	3	<input checked="" type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	Type 11	Arrival <input type="checkbox"/>	10	10	2012	08:22	<input checked="" type="checkbox"/>				
		Clear <input type="checkbox"/>	10	10	2012	09:22					

Personnel ID	Name	Rank or Grade	Attend <input checked="" type="checkbox"/>	Action Taken	Action Taken	Action Taken	Action Taken
M3223	Nelson, Derek	ENGP	X				
M3232	Platt, Randy	FF3/PARA	X				
M3390	Kelley, Tim	CAPT	X				

2	ID T31	Dispatch <input type="checkbox"/>	10	10	2012	08:20	Sent <input checked="" type="checkbox"/>	4	<input checked="" type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	Type 12	Arrival <input type="checkbox"/>	10	10	2012	08:28	<input checked="" type="checkbox"/>				
		Clear <input type="checkbox"/>	10	10	2012	08:39					

Personnel ID	Name	Rank or Grade	Attend <input checked="" type="checkbox"/>	Action Taken	Action Taken	Action Taken	Action Taken
M3209	Wardein, Greg	ENGP	X				
M3385	Rae, Jason	CAPT	X				
M3405	Cole, Daniel	FF3/EMT	X				
M3410	Clapp, Brock	FF3/EMT	X				

3	ID	Dispatch <input type="checkbox"/>					Sent <input type="checkbox"/>		<input type="checkbox"/> Suppression <input type="checkbox"/> EMS <input type="checkbox"/> Other	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
	Type	Arrival <input type="checkbox"/>					<input type="checkbox"/>				
		Clear <input type="checkbox"/>									

Personnel ID	Name	Rank or Grade	Attend <input checked="" type="checkbox"/>	Action Taken	Action Taken	Action Taken	Action Taken
			<input type="checkbox"/>				
			<input type="checkbox"/>				
			<input type="checkbox"/>				
			<input type="checkbox"/>				
			<input type="checkbox"/>				
			<input type="checkbox"/>				
			<input type="checkbox"/>				

20

From: 'Commerce Centre' <ccbusinesspark@gmail.com>
To: sagecrest<sagecrest@frpmrentals.com>
Sent: Monday, October 22, 2012 4:10 PM
Subject: Re: CO detectors

Tara, did you test for CO with our tester in the unit when Molly complained? and when? When you talked to the fire marshal, did you discuss the procedures put in place in March 2012?

Virginia and Jon

On Thu, Oct 11, 2012 at 8:55 AM, sagecrest <sagecrest@frpmrentals.com> wrote:

Hi Jon,

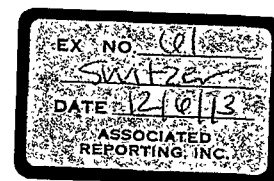
After yesterday's events I would like to have Chris go into every unit and check and make sure the CO detectors that we installed are in working condition. The units that do not have CO detectors I would like him to install one. Talking with the fire department yesterday they said that the detectors that we gave the tenants when this first happened is not enough to cover our end. He said the tenants may not have even put the batteries in and installed them properly. He said if they didn't then it would not be the tenants fault it would be our responsibility to make sure they are installed and working properly. He recommended installing the CO detectors that we have been installing in every unit. I would really like to do this to take the heat off us. I talked to Chris, he would charge \$25 per building to make sure they are all good. If there is a unit that needs a CO detector it would be \$55 for the detector and \$25 for installing it. Please let me know your thoughts.

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com



CONFIDENTIAL

000298 FR02728

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)
HYMAS, individually and as)
the natural parents of)
PRIVATE FIRST CLASS McQUEN C.)
FORBUSH, USMC (Deceased),)
and BREANNA HALOWELL,)

Plaintiffs,)

vs.)

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY)
OWNERS' ASSOCIATION, INC., an)
Idaho non-profit corporation,)
d/b/a SAGECREST MULTIFAMILY)
PROPERTY OWNERS' ASSOCIATION,)
et al.,)

Defendants.)

CONTINUED DEPOSITION OF LIZZ LOOP
PAGES 176-430

July 8, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

[Page 1]

1 I'm going to go back through some of
2 your deposition from the first day. If I misstate
3 your responses, please clarify. And if you don't
4 understand a question that I ask you, let me know
5 because I will ask you a question you don't
6 understand, I'm sure.
7 Mr. Palmer was asking you about the --
8 changing COs during preventative maintenance, and
9 you stated that this started in March of 2012,
10 installing CO detectors during preventative
11 maintenance.
12 Is that correct?
13 A. Yes.
14 Q. And then I believe you stated that
15 preventative maintenance would be done annually?
16 A. Yes. That's the goal is to have it done
17 every year.
18 Q. Do you know, about what month would you
19 start preventative maintenance?
20 When would it be done during the year?
21 A. We start during the slower months of the
22 year, which is -- typically starts in the fall
23 through the winter.
24 Q. So you wouldn't start putting in CO --
25 installing CO detectors until the fall through
213

[Page 38]

1 preventative maintenance?
2 A. Through preventative maintenance,
3 correct. We were able to do some preventative
4 maintenance during the summer that year.
5 Q. And how is the preventative maintenance
6 tracked?
7 A. Tara keeps track of that. You would
8 have to ask her how she tracked it.
9 Q. Is there a system that First Rate uses
10 to track things like this? Do you have a software
11 program?
12 A. Yes. Our software program would show us
13 when we made the work orders and then when we get
14 billed for the work that is completed.
15 Q. What's the name of your software program
16 that you use?
17 A. ProMIS.
18 Q. So how does that work? Is it just like
19 an Excel-type software where you plug in numbers,
20 or does it notify you when something needs to be
21 done?
22 A. You can set it up to where it will
23 remind you.
24 Q. Do you know if you -- if First Rate used
25 ProMIS to remind you that anything needed to be
214

[Page 39]

1 done?
2 A. I don't know if Tara set that up or not.
3 It is per user. You can set it up for yourself.
4 Q. And would you still have the ProMIS
5 records from this time period?
6 A. Yes. They could be -- they could be
7 pulled up.
8 Q. Okay.
9 MR. STACEY: Rob, do you think we could get
10 those records?
11 MR. ANDERSON: I think we produced the work
12 order histories.
13 MR. STACEY: Through the ProMIS software?
14 MR. ANDERSON: I think they've been
15 produced.
16 MR. STACEY: I don't know if I've seen that.
17 Maybe I don't know what it looks like.
18 MR. ANDERSON: I'll show you at a break, if
19 you want to see them.
20 MR. STACEY: All right.
21 Q. (BY MR. STACEY) The CO procedures, this
22 was Exhibit 53.
23 Would you take a look at those, please.
24 Do you have those open?
25 A. Yes.
215

[Page 40]

1 Q. Okay. As far as you know, in March of
2 2012, did First Rate talk about these procedures
3 amongst yourselves, the employees?
4 A. The people that would have discussed it
5 would have been Tara, Missy, and Sheila. They're
6 the ones that met with Mr. Kalsbeek to go over the
7 procedures that were created.
8 Q. Did any of them talk to you about these
9 procedures?
10 A. Not to my recollection.
11 Q. I believe in your last deposition, you
12 said that First Rate would get together weekly,
13 talk about issues, have -- just kind of go over
14 anything you needed to talk about for the upcoming
15 week.
16 Is that correct?
17 A. Correct, yes.
18 Q. Did you ever talk about these CO
19 procedures?
20 A. No, not to my recollection.
21 Q. So as far as you know, did Tara follow
22 these procedures during --
23 Let me strike that.
24 From March 2012 until November, did you
25 believe Tara was following these procedures?
216

[Page 41]

[14] (Pages 38 to 41)

<p>1 A. Yes.</p> <p>2 Q. And you never did discuss these with</p> <p>3 Tara?</p> <p>4 A. Not that I recall.</p> <p>5 Q. She never told you that she didn't think</p> <p>6 these procedures were accurate or adequate?</p> <p>7 A. I don't recall.</p> <p>8 Q. Would you look at No. C on these</p> <p>9 procedures.</p> <p>10 A. Yes.</p> <p>11 Q. It says, "During the time of testing,</p> <p>12 the filters shall be changed in the area around the</p> <p>13 water heater, inspected and cleaned, if necessary."</p> <p>14 Do you know if Tara followed this</p> <p>15 procedure?</p> <p>16 A. To my knowledge, she did.</p> <p>17 Q. And I believe she testified that they</p> <p>18 had a vacuum that they took with them when they</p> <p>19 would change the filters, and they would go in and</p> <p>20 inspect, and if it needed to be cleaned, they would</p> <p>21 clean it.</p> <p>22 Do you have any knowledge of that?</p> <p>23 A. I believe she followed the procedures.</p> <p>24 Q. Okay. And would you look at the bottom</p> <p>25 paragraph, the second sentence.</p> <p>217</p> <p>[Page 42]</p>	<p>1 A. Correct.</p> <p>2 Q. And it's your understanding that she --</p> <p>3 she did change them out during lease renewals or if</p> <p>4 they found a faulty smoke detector?</p> <p>5 MR. ANDERSON: Well, I'm going to object</p> <p>6 when you say "she" changed them out.</p> <p>7 MR. STACEY: Let me clarify.</p> <p>8 MR. ANDERSON: There's more to it than that.</p> <p>9 Q. (BY MR. STACEY) That Tara changed these</p> <p>10 out following the procedures.</p> <p>11 A. Tara personally --</p> <p>12 MR. ANDERSON: Form.</p> <p>13 THE WITNESS: -- did not change --</p> <p>14 Q. (BY MR. STACEY) Okay. Fair enough.</p> <p>15 That she would --</p> <p>16 That Tara would --</p> <p>17 Was it Chris that would install these?</p> <p>18 Who would install them?</p> <p>19 A. Chris would install them.</p> <p>20 Q. During lease renewals, she would</p> <p>21 instruct Chris to install CO detectors?</p> <p>22 A. Correct.</p> <p>23 Q. Okay. But you'd also ask Chris to</p> <p>24 install them if there was a faulty smoke detector?</p> <p>25 A. Yes.</p> <p>219</p> <p>[Page 44]</p>
<p>1 A. Starting with, "CO monitors shall be" --</p> <p>2 Q. Yeah. Would you go ahead and read that.</p> <p>3 A. "CO" --</p> <p>4 MR. ANDERSON: Just to yourself.</p> <p>5 MR. STACEY: Or she can read that out loud.</p> <p>6 That would be fine for the record.</p> <p>7 THE WITNESS: "CO monitors shall be changed</p> <p>8 out or replace existing smoking detectors in the</p> <p>9 hallway around the hallway area during turnovers."</p> <p>10 Q. (BY MR. STACEY) Keep going.</p> <p>11 A. "Preventative maintenance, lease</p> <p>12 renewals, or faulty smoke detector until complete."</p> <p>13 Q. So did Tara follow this procedure? Do</p> <p>14 you know?</p> <p>15 A. To my knowledge, yes.</p> <p>16 Q. So as you read this, do you understand</p> <p>17 that this means that CO monitors will be changed</p> <p>18 out or replaced during turnovers?</p> <p>19 You've stated that, yes?</p> <p>20 A. Yes.</p> <p>21 Q. Preventative maintenance?</p> <p>22 A. Yes.</p> <p>23 Q. Lease renewals?</p> <p>24 A. Yes.</p> <p>25 Q. Or if you found a faulty smoke detector?</p> <p>218</p> <p>[Page 43]</p>	<p>1 Q. How would you find a faulty smoke</p> <p>2 detector?</p> <p>3 A. Chris would find it during preventative</p> <p>4 maintenance.</p> <p>5 Q. Okay. Do you know the --</p> <p>6 You said there's a document listing the</p> <p>7 duties of the preventative maintenance?</p> <p>8 A. Yes.</p> <p>9 Q. Do you know what was on -- what duties</p> <p>10 are on the preventative maintenance?</p> <p>11 A. I know a few of the items off the top of</p> <p>12 my head, but I don't have the whole list.</p> <p>13 Q. Tell me what you know.</p> <p>14 A. Caulking around the tub, checking the</p> <p>15 furnace filters, calking around the toilets,</p> <p>16 checking the smoke detectors to make sure they were</p> <p>17 working, plumbing, faucets, faucets leaking,</p> <p>18 toilets running.</p> <p>19 Q. Okay. And who would be charged --</p> <p>20 Who would pay Chris for the preventative</p> <p>21 maintenance?</p> <p>22 A. The owners.</p> <p>23 Q. Of the units?</p> <p>24 A. Yes.</p> <p>25 Q. So he would go into whichever unit; that</p> <p>220</p> <p>[Page 45]</p>

1 A. No.
 2 Q. Can't be thrown away?
 3 A. Okay.
 4 Q. Taken by a former tenant, true?
 5 A. True.
 6 Q. I mean, there are reasons that you're
 7 aware of that it's recommended -- and you've heard
 8 this, I think -- that hardwired detectors are
 9 preferable to battery-operated detectors,
 10 correct --
 11 A. Correct.
 12 Q. -- at least as you sit here today?
 13 MR. ANDERSON: Hold on. "You've heard
 14 this"? Your question assumes something that I
 15 haven't seen a record of. What are you referring
 16 to?
 17 MR. LOGAN: I think she's answered, Counsel.
 18 Q. (BY MR. LOGAN) I'm going to refer you
 19 to Exhibit 123.
 20 Specifically, I want to ask you about
 21 that first e-mail on the first page of Exhibit 123,
 22 which was an e-mail sent from Tara to Mr. Kalsbeek,
 23 and then it looks like you and Mr. Drost were cc'd
 24 on that e-mail.
 25 Is that right?
 393

[Page 218]

1 A. Yes.
 2 Q. Do you remember --
 3 You recognize this e-mail, don't you?
 4 A. Yes.
 5 Q. Okay. And in there, Tara describes that
 6 she had talked to the fire department.
 7 Do you see that?
 8 A. Yes.
 9 Q. And this e-mail is on October 11th,
 10 2012. She says yesterday that she had talked to
 11 the fire department, so that would have been
 12 October 10th, 2012, and that they said that, "The
 13 detectors that we gave the tenants when this first
 14 happened is not enough to cover our end. He said
 15 the tenants may not have even put the batteries in
 16 and installed them properly. He said if they
 17 didn't, then it would be -- not be the tenants'
 18 fault. It would be our responsibility to make sure
 19 they are installed and working properly.
 20 "He recommended installing the CO
 21 detectors that we have been installing in every
 22 unit. I would really like to do this and take the
 23 heat off of us."
 24 Do you remember that, getting that
 25 e-mail from Tara?
 394

[Page 219]

1 A. Yes.
 2 Q. And that is about a month before the
 3 November 10th, 2012, poisoning.
 4 What I want to know is: What steps did
 5 First Rate take to get the hardwired detectors
 6 installed after October 11th, 2012, that you're
 7 aware of?
 8 MR. ANDERSON: After asking if they could do
 9 it?
 10 Q. (BY MR. LOGAN) Yeah, after this e-mail.
 11 And I recognize that this is an e-mail to
 12 Mr. Kalsbeek, right?
 13 A. Yes.
 14 Q. And you and Mr. Drost were cc'd.
 15 Do you know if there was ever a response
 16 from Mr. Kalsbeek?
 17 A. Yeah. He stated he was going to discuss
 18 it with the board.
 19 Q. And was there a further response that
 20 you're aware of?
 21 A. The only thing I recall is the meeting
 22 that was held the end of October.
 23 Q. The annual meeting and the meeting
 24 before that?
 25 A. It wasn't the annual meeting. It was a
 395

[Page 220]

1 meeting with, I believe, Jon, Tara --
 2 I don't remember who all was there.
 3 And it was discussed that the way we
 4 were doing it, because we were doing preventative
 5 maintenance, that was sufficient and it was an
 6 appropriate action that we were taking and we were
 7 going to continue it that way. That was agreed by
 8 everybody.
 9 Q. What reasons were there, if any, that
 10 the hardwired detectors were not installed
 11 immediately after the October 11 e-mail?
 12 MR. HOWELL: Objection; form.
 13 MR. ANDERSON: Asked and answered. She
 14 just --
 15 Q. (BY MR. LOGAN) I understand there were
 16 meetings, but were there specific reasons for not
 17 doing the -- having the hardwired detectors
 18 installed immediately?
 19 A. We were having them installed during
 20 preventative maintenance.
 21 Q. And --
 22 A. Preventative maintenance was going on
 23 during this time.
 24 Q. And that was just good enough for First
 25 Rate?
 396

[Page 221]

[59] (Pages 218 to 221)

<p>1 MR. ANDERSON: Object to the form; 2 argumentative. 3 Go ahead and answer. 4 THE WITNESS: It -- it's how we were 5 following the procedures. 6 Q. (BY MR. LOGAN) Right, but you had just 7 had a guest of one of your tenants killed inside an 8 apartment, and so -- 9 MR. ANDERSON: What do you mean? Don't 10 be -- 11 MR. LOGAN: What I mean is that McQuen 12 Forbush died on November 10th, 2012. 13 MR. ANDERSON: And this is October 11th. 14 MR. LOGAN: Right. And so -- 15 MR. ANDERSON: He didn't. 16 MR. LOGAN: I'm sorry. I'm sorry. You're 17 right. 18 MR. ANDERSON: Okay. 19 Q. (BY MR. LOGAN) Let me go back. Now I'm 20 backwards on time, okay? 21 MR. ANDERSON: Gmails can do that. 22 MR. LOGAN: What's that? 23 MR. ANDERSON: Gmails go the other way. 24 Q. (BY MR. LOGAN) What do you know about 25 the Molly Collins incident? 397</p> <p style="text-align: right;">[Page 222]</p>	<p>1 carbon monoxide incident where there's another 2 water heater that is a danger to the tenant and 3 their guest, right -- 4 A. Yes. 5 Q. -- there was the decision made by First 6 Rate that the current scheme of installing 7 hardwired detectors over time was good enough? 8 MR. ANDERSON: Object to the form; misstates 9 the testimony and the record. 10 THE WITNESS: It was not First Rate that 11 made the sole decision. The POA assisted in that 12 decision. 13 The emergency calls had gone down 14 from -- in July of 2011 when we had replaced all 15 the water heaters. We felt we were acting 16 appropriately. We had an engineer come out and 17 give us recommendations. We gave those 18 recommendations and pricing to the owners. 19 Q. (BY MR. LOGAN) Well, let me ask you 20 about that because you've said that a few times 21 today. 22 How many of those recommendations were 23 actually put into action? 24 MR. ANDERSON: What do you mean "put into 25 action"? Like -- 399</p> <p style="text-align: right;">[Page 224]</p>
<p>1 A. I know that her detector had gone off, 2 her water heater tested high, and we immediately 3 replaced it. 4 Q. Okay. And so I got a little bit 5 confused on time, and I apologize. So let me just 6 try to be as clear as I can, okay? 7 You had had an incident, and this was 8 not the first time. You had had another carbon 9 monoxide incident in October of 2012 at Sagecrest, 10 right? 11 MR. ANDERSON: Object to the form. 12 Interjection of "not the first time." 13 Q. (BY MR. LOGAN) Is that true? 14 A. Yes. 15 Q. And there had been several carbon 16 monoxide incidents prior to that within the year, 17 right? 18 A. October of -- 19 Q. 2012. 20 A. There were some identified in March, but 21 we resolved them. 22 Q. Okay. So in October, there was another 23 incident involving Molly Collins, right? 24 A. Yes. 25 Q. And knowing that there had been this 398</p> <p style="text-align: right;">[Page 223]</p>	<p>1 THE WITNESS: They were given -- 2 Sorry. Do you want -- 3 MR. ANDERSON: Go ahead. 4 THE WITNESS: The recommendations were given 5 to the owners. If the owners responded and wanted 6 something done, then we would have done it. I 7 don't know if any responded and told us to do 8 anything. Tara would have handled that. 9 Q. (BY MR. LOGAN) Do you think that by 10 making recommendations, that's completing your 11 obligation to look after the safety of the tenants 12 and the guests at Sagecrest Apartments? 13 A. We made the recommendations and we were 14 installing CO detectors and we were testing. 15 Q. And as far as you are concerned, that 16 was good enough for First Rate? 17 A. I feel it was an appropriate action. 18 Q. Do you think that it would have been 19 appropriate to wait another year or two to install 20 a hardwired carbon monoxide detector in 4624? 21 MR. ANDERSON: Object to the form. 22 THE WITNESS: Do I think it would have been 23 appropriate to wait another year or two? 24 Q. (BY MR. LOGAN) Yes. 25 A. No. It was being done during 400</p> <p style="text-align: right;">[Page 225]</p>

1 A. Correct.
 2 Q. Considering that Express Plumbing, a
 3 professional vendor, told you to clean these flame
 4 arrestors and it wasn't done, do you think that was
 5 appropriate?
 6 A. I feel the way we handled the whole
 7 situation, we had the water heaters replaced
 8 immediately that had the high readings and we
 9 started installing CO detectors.
 10 I don't understand the cleaning a flame
 11 resistor. I don't -- I don't know of us talking to
 12 anybody else about it.
 13 Q. And --
 14 A. I don't even know what it requires.
 15 Q. And I appreciate that you personally
 16 don't understand it, so I guess I'll ask this
 17 question: Was there someone at First Rate that did
 18 understand it then?
 19 MR. ANDERSON: Understand what?
 20 MR. PALMER: The cleaning of flame arrestors
 21 and the importance of it as outlined in Exhibit 42.
 22 THE WITNESS: I don't know.
 23 Q. (BY MR. PALMER) I think you testified
 24 that you never read the instruction manual for the
 25 A.O. Smith water heaters, correct?
 421

[Page 246]

1 A. Correct.
 2 Q. Do you know if someone at First Rate
 3 did?
 4 A. I don't know.
 5 MR. PALMER: Okay. That's all I have.
 6 Thank you.
 7 MR. LOGAN: Let me just follow up on one if
 8 it's okay.
 9
 10 FURTHER EXAMINATION
 11 BY MR. LOGAN:
 12 Q. Do you still have Exhibit 123 that I
 13 asked you about a couple of minutes ago?
 14 A. Yes.
 15 Q. I just wanted to refer you back to 123.
 16 I wanted to ask you about after First Rate's
 17 employee, Ms. Gaertner, talked with the fire
 18 department on October 10th, 2012, and the fire
 19 department, as Ms. Gaertner represents in this
 20 e-mail in Exhibit 123, told her that the detectors
 21 were not enough and that tenants might not even put
 22 batteries in them and that the fire department
 23 recommended installing CO detectors, hardwired
 24 ones.
 25 Did First Rate take any steps to notify
 422

[Page 247]

1 the tenants of that issue?
 2 A. I don't know. Not to my knowledge.
 3 Q. Do you know if the tenants were told
 4 anything at all about the ongoing carbon monoxide
 5 issues and dangers after the Molly Collins incident
 6 in October of 2012?
 7 A. I don't know.
 8 Q. There was a recognized danger as of
 9 October 11th, 2012, at the Sagecrest Apartments,
 10 true --
 11 MR. ANDERSON: Object to the form.
 12 Q. (BY MR. LOGAN) -- as we can see in
 13 Ms. Gaertner's e-mail in Exhibit 123, right?
 14 MR. ANDERSON: Object to the form.
 15 THE WITNESS: Yes.
 16 Q. (BY MR. LOGAN) And what did First Rate
 17 tell the tenants?
 18 A. I don't know.
 19 Q. Have you ever heard, as the general
 20 manager of First Rate Property Management, that the
 21 tenants were told anything at all after the Molly
 22 Collins incident in October of 2012?
 23 A. Not to my recollection.
 24 Q. Do you think, as a professional property
 25 management person yourself, that it would have been
 423

[Page 248]

1 fair to tell the tenants what was going on in
 2 October of 2012 with the carbon monoxide concerns?
 3 MR. ANDERSON: Object to the form in terms
 4 of "what was going on." The question is vague.
 5 THE WITNESS: I don't know. I -- I can't
 6 say what I would have thought at that time.
 7 Q. (BY MR. LOGAN) If you were a tenant at
 8 the Sagecrest Apartments on October 12th, 2012,
 9 would you have wanted to know about what had
 10 happened with Molly Collins and about the fire
 11 department's discussions with First Rate Property
 12 Management?
 13 MR. ANDERSON: Objection; calls for
 14 speculation.
 15 THE WITNESS: I don't know.
 16 Q. (BY MR. LOGAN) Do you think it's the
 17 kind of information that a tenant reasonably should
 18 be provided?
 19 MR. ANDERSON: Objection; calls for
 20 speculation.
 21 THE WITNESS: I -- I don't know.
 22 Q. (BY MR. LOGAN) Do you think, as a
 23 professional property manager, that tenants at your
 24 property should be provided information of dangers
 25 that could be lethal on the property?
 424

[Page 249]

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 14th day of July, 2014.



Andrea J. Wecker
ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.

My Commission Expires: 2-14-17

22



Jennifer Yates <jlmyers.law@gmail.com>

Fwd: Meeting minutes and amended budget

1 message

Matt Switzer <matt.switzer@ymail.com>
To: jlmyers.law@gmail.com

Thu, Dec 5, 2013 at 8:50 PM


Sent from my iPhone

Begin forwarded message:

From: Lizz <lizz@frpmrentals.com>
Date: October 29, 2012 at 8:27:00 AM MDT
To: "Lizz Loop" <lizz@frpmrentals.com>
Cc: sagecrest <sagecrest@frpmrentals.com>, "Drost, RMP,MPM, Tony" <Tony@frpmrentals.com>
Subject: Meeting minutes and amended budget
Reply-To: Lizz <lizz@frpmrentals.com>

Attached you find the minutes and amended budget from the annual meeting that was held on Friday morning.

Thank you,
Lizz Loop, MPM®, RMP®
General Manager
First Rate Property Management, Inc. CRMC®
(208) 577-5202 – direct line

2 attachments **SC 2013 Annual Meeting Minutes.pdf**
26K **SC Budgets 2013 Amended.pdf**
96K

SAGECREST POA MEETING MINUTES

OCTOBER 26, 2012

CALL TO ORDER:

President Jon Kalsbeek called the meeting to order at 10:04am MST.

ROLL CALL OF OFFICERS:

Jon Kalsbeek	President	Present in person
Jay Arla	Vice President	Via Phone
Chris Schwab	Secretary	Via Phone
David Meisner	Treasurer	Present in person

ROLL CALL OF MEMBERS:

Pamela Lee	Via Phone
Janet Parr	Via Phone
Chris Schwab	Via Phone
Jay Arla:	Via Phone
Beth Raff	Via Phone
Jason Powell	Via Phone
Frank Deleo	Via Phone
Cindy Owens	Present in person
Mark Duffin	Present in person
Young Lim	Present in person
Eugene Servatius	Present in person
Winston Stokes	Present in person
Paul Ryan	Present in person

READING OF LAST MEETING MINUTES:

Motion was made, seconded, and approved to accept the minutes as presented.

TREASURER'S REPORT:

Treasurer David Meisner and President Jon Kalsbeek summarized the 2012 YTD actual expenses to budget. A motion was made, seconded, and approved to accept Treasurer's report as presented.

PROPERTY MANAGEMENT REPORT:

Tony Drost, owner of First Rate Property Management, stated that there was only one vacant unit of the properties they manage and that a new tenant had already been approved to move-in the apartment in November. There are two units on notice to vacate. Although winter and the holiday season is a bad time to fill vacancies, FRPM felt that due to the low vacancy, now would be a good time to try to get \$10 more in rent. FRPM will communicate to the SCPOA should that rent increase prove to be too high. Rents within the complex have continued to improve.

Tony explained that rents are up and vacancies are down within the Boise and Meridian areas. Tony also stated that we are seeing a new trend where the new young professionals prefer to rent over owning a home. Therefore we are seeing a new trend with higher-end rentals with very high rents.

REVIEW OF 2012:

LANDSCAPING: A motion was made, seconded, and passed to approve the TMS bid and for the President to execute a 2-year contract with TMS.

ADVERTISING: President Kalsbeek discussed the evaluation of the For Rent Magazine and the cost of \$800 every four weeks. Also, in the past, the POA has covered the cost of additional advertising of specific units with upcoming vacancies and that this will no longer be the case. Effective January 1, 2013, individual owners will be billed from the management company for this additional advertising and that additional advertising will be equally divided up for all properties on notice.

OLD BUSINESS:

VOTING ON THE RESTATING OF THE POA DOC'S:

Not all members had submitted their written responses and signatures concerning the proposed changes to Associations Bylaws, CC&Rs, and Complex Rules. Per the request of the members, additional time will be allotted for questions and submission of their vote for or against. Discussion regarding changing SCPOA Association Management to another company.

RESOLUTION BUSINESS PARK-POA:

President Kalsbeek explained that he sits on the BOD for Resolution as well and that through his efforts, he was able to prove that the SCPOA was being overcharged for their dues. Therefore the SCPOA was given a \$2,000 credit and 2013 dues will be reduced by about \$1,500.

NEW BUSINESS:

LANDSCAPING: President Kalsbeek reminded all members that the landscape company blows out the stairwells for all buildings every week all year long and members are to report if this is not done. Also, the BOD is working through some clean-up and replacement of dead or dying trees and shrubs. It was stated that the complex appearance is very good.

CO2 TESTING PROCEDURES:

All members were sent the procedures and purpose of the testing of CO2 within the units managed by FRPM. Also, in the past, the POA has covered the cost to replace the furnace filters on a quarterly basis and effective January 1, 2013, this will be an individual owner expense. As a reminder, the filter replacement program was created due to the multiple floods being caused by the Hydronic furnaces. There have not been any floods for units that had the PRVs, freeze-stats, and replacement of bad pressure tanks, along with the filter replacement program. It was strongly encouraged that if you have not installed the preventative measures, you should as the cost of one flood is far greater than the preventative measures, which so far have denied any floods.

INSTALL NEW CARPET IN CLUBHOUSE:

A motion was made, seconded, and passed to add the expense to replace the clubhouse carpet to the 2013 budget. It was later asked if the carpet could be installed this winter due to the slow activity. Upon direction of the BOD, FRPM can get this installed so that the bill is paid in 2013 and therefore reflected within the 2013 budget.

INSTALL CARD CONTROL ACCESS FOR GYM-POOL:

A motion was made, seconded, and carried to add the expense to install a card access system to the clubhouse and pool to the 2013 budget.

LITIGATION UPDATE:

President Kalsbeek gave the history of the complaint, which occurred when H&H was managing the complex but during the 5 month period in which the members were trying to replace them. The complaint names SCPOA and the Association's attorney is working on getting SCPOA removed, as the Resident Manager was under the direction of their employer, H&H Properties.

REVIEW OF 2013 BUDGET- CURRENTLY BREAK EVEN:

A motion was made, seconded, and passed to amend the 2013 budget as presented to increase the Capital Improvement expenses by \$2,500 for new carpeting in clubhouse and office. Additionally, the amended motion was to reduce the resolution dues to \$6,000 to reflect the new assessment amount.

ELECTION OF 2013 OFFICERS:

There was only one written nomination submitted and that was for Jay Arla as VP. A motion was made, seconded, and passed to close nominations and to accept:

Jon Kalsbeek President
Jay Arla Vice President
Chris Schwab Secretary
David Meisner Treasurer

ADJOURNMENT:

A motion to adjourn was made, seconded, and passed to adjourn the meeting at 11:45am MST

Robert A. Anderson, ISB No. 2124
Robert A. Mills, ISB No. 7114
ANDERSON, JULIAN & HULL LLP
C. W. Moore Plaza
250 South Fifth Street, Suite 700
Post Office Box 7426
Boise, Idaho 83707-7426
Telephone: (208) 344-5800
Facsimile: (208) 344-5510
E-Mail: raanderson@ajhlaw.com

NO. _____
A.M. _____ FILED P.M. 403

AUG 22 2014

CHRISTOPHER D. RICH, Clerk
By JAMIE MARTIN
DEPUTY

Attorneys for Defendants
First Rate Property Management, Inc. and
Tony Drost

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

**TRAVIS FORBUSH and GRETCHEN
HYMAS**, individually and as the natural parents
of **PRIVATE FIRST CLASS MCQUEN C.**
**FORBUSH, USMC (Deceased), and BREANNA
HALOWELL,**

Plaintiffs,

vs.

**SAGECREST MULTI FAMILY
PROPERTY OWNERS' ASSOCIATION,
INC. et al.,**

Defendants.

Case No. CV PI 13-04325

**AFFIDAVIT OF ROBERT A. MILLS
IN OPPOSITION TO SAGECREST
POA'S MOTION FOR SUMMARY
JUDGMENT**

STATE OF IDAHO)
) ss.
County of Ada)

ROBERT A. MILLS, having been first duly sworn upon oath, deposes and says as follows:

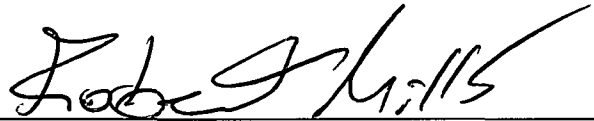
**AFFIDAVIT OF ROBERT A. MILLS IN OPPOSITION TO SAGECREST POA'S
MOTION FOR SUMMARY JUDGMENT - 1**

000312

1. That your Affiant is an attorney duly licensed to practice law within the State of Idaho and is a member of the law firm of Anderson, Julian & Hull LLP, attorneys for the above-entitled Defendants First Rate Property Management, Inc., and Tony Drost.
2. The information contained herein is of your Affiant's own personal knowledge and by diligent review and analysis of the documents on record in this matter.
3. That your Affiant is over eighteen years of age and competent to testify to the matters stated herein.
4. Building 46 is a Four Plex located at Lot Number 76 on the Multi Family Portion of the Sagecrest Subdivision Plat.
5. Attached hereto as **Exhibit A** is a true and correct copy of the Plat of the Sagecrest Subdivision.
6. Attached hereto as **Exhibit B** is a true and correct copy of an email by SPOA president Jon Kalsbeek dated August 18, 2010 which was identified as Exhibit 160 at Pages 395-396 of Volume I of the deposition of Jon Kalsbeek taken on April 3-4, 2014.
7. Attached hereto as **Exhibit C** is a true and correct copy of an email by SPOA president Jon Kalsbeek dated August 4, 2010 which was identified as Exhibit 110 at Page 78 of Volume I of the deposition of Jon Kalsbeek taken on April 3-4, 2014.
8. Attached hereto as **Exhibit D** is a true and correct copy of Pages 24-27; 76-79; 280-283; 356-363; 392-399; 408-415 of Volume I of the deposition of Jon Kalsbeek taken on April 3-4, 2014.

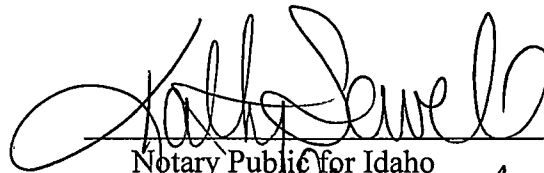
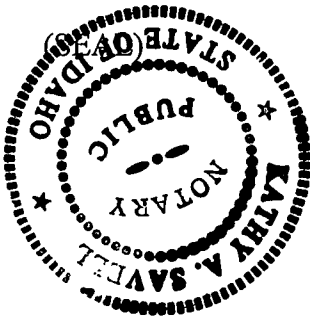
9. Attached hereto as **Exhibit E** is a true and correct copy of Pages 40-43 and 140-143 of Volume II of the deposition of Jon Kalsbeek taken on May 28, 2014.

FURTHER your Affiant saith not.



Robert A. Mills

SUBSCRIBED AND SWORN to before me this 22ND day of August, 2014.



Notary Public for Idaho

Residing at Canyon Co, Idaho

My Commission Expires 6-25-15

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22 day of August, 2014, I served a true and correct copy of the foregoing by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

Eric R. Clark, Esq.
CLARK & ASSOCIATES, ATTORNEYS
P.O. Box 2504
Eagle, Idaho 83616
Telephone: (208) 830-8084
Facsimile: (208) 939-7136
Email: eclark101@hotmail.com
Attorneys for Plaintiffs

<input type="checkbox"/>	U.S. Mail, postage prepaid
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	E-Mail

Tyson E. Logan
THE SPENCE LAW FIRM
PO Box 548
15 S. Jackson St.
Jackson, WY 83001
Telephone: 307-733-7290
Facsimile: 307-733-5248
Email: logan@spencelawyers.com

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<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	E-Mail

Mark L. Tripp
Jason C. Palmer
Bradshaw, Fowler, Proctor & Fairgrave, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
Phone: (515) 246-5858
Fax: (515) 246-5808
Email: palmer.jason@bradshawlaw.com
Attorneys for Defendant A.O. Smith

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<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile
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Elam & Burke, PA
Phone: (208) 343-5454
Fax: (208) 384-5844
Email: jdl@elamburke.com
Attorneys for A.O. Smith

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<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	E-Mail

Michael Elia
Craig Stacy
Moore & Elia, LLP
PO Box 6756
Boise, ID 83707
Phone: (208) 336-6900 Ext.
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Attorneys for Defendant Sagecrest POA

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☐ Overnight Mail
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☒ E-Mail

Michael Haman
Haman Law Office
923 North 3rd Street
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Coeur d' Alene, ID 83816-2155
208 667-6287
208 660-4306 (c)
208 676-1683 (f)
Email: mlhaman.law@gmail.com
*Attorney for Matthew E. Switzer,
Matthew E. Switzer Trust
& Matthew E. Switzer, Trustee*

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Chris Graham
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cgraham@idalaw.com
*Attorneys for Anfinson Plumbing and H&H
Properties*

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☐ Overnight Mail
☐ Facsimile
☒ E-Mail

John M. Howell
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Phone: (208) 344-7300
Fax: (208) 344-7077
*Attorneys for Defendants Jon Kalsbek, Jay
Arla, Christopher Schwab & David Meisner*

<input type="checkbox"/>	U.S. Mail, postage prepaid
<input type="checkbox"/>	Hand-Delivered
<input type="checkbox"/>	Overnight Mail
<input type="checkbox"/>	Facsimile
<input checked="" type="checkbox"/>	E-Mail



Robert A. Anderson

Affidavit of Robert A. Mills in
Opposition to Sagecrest POA's
Motion for Summary Judgment

EXHIBIT A

PLAT OF

SAGECREST SUBDIVISION

A RESUBDIVISION OF LOT 6, BLOCK 1, RESOLUTION SUBDIVISION NO. 1
 LYING IN THE NW 1/4 SECTION 20, T. 3 N., R. 1 E., B.M.,
 MERIDIAN, ADA COUNTY, IDAHO

2004

1/4 CORNER
 7/8" 5/16" REBAR & PLASTIC CAP
 C.P. 447 NO. 103135427

17
 20

60 30 0 60 120 180
 SCALE IN FEET



S. MILLENNIUM WAY

E. GALA STREET

PLAT COPY INSTR. NO.

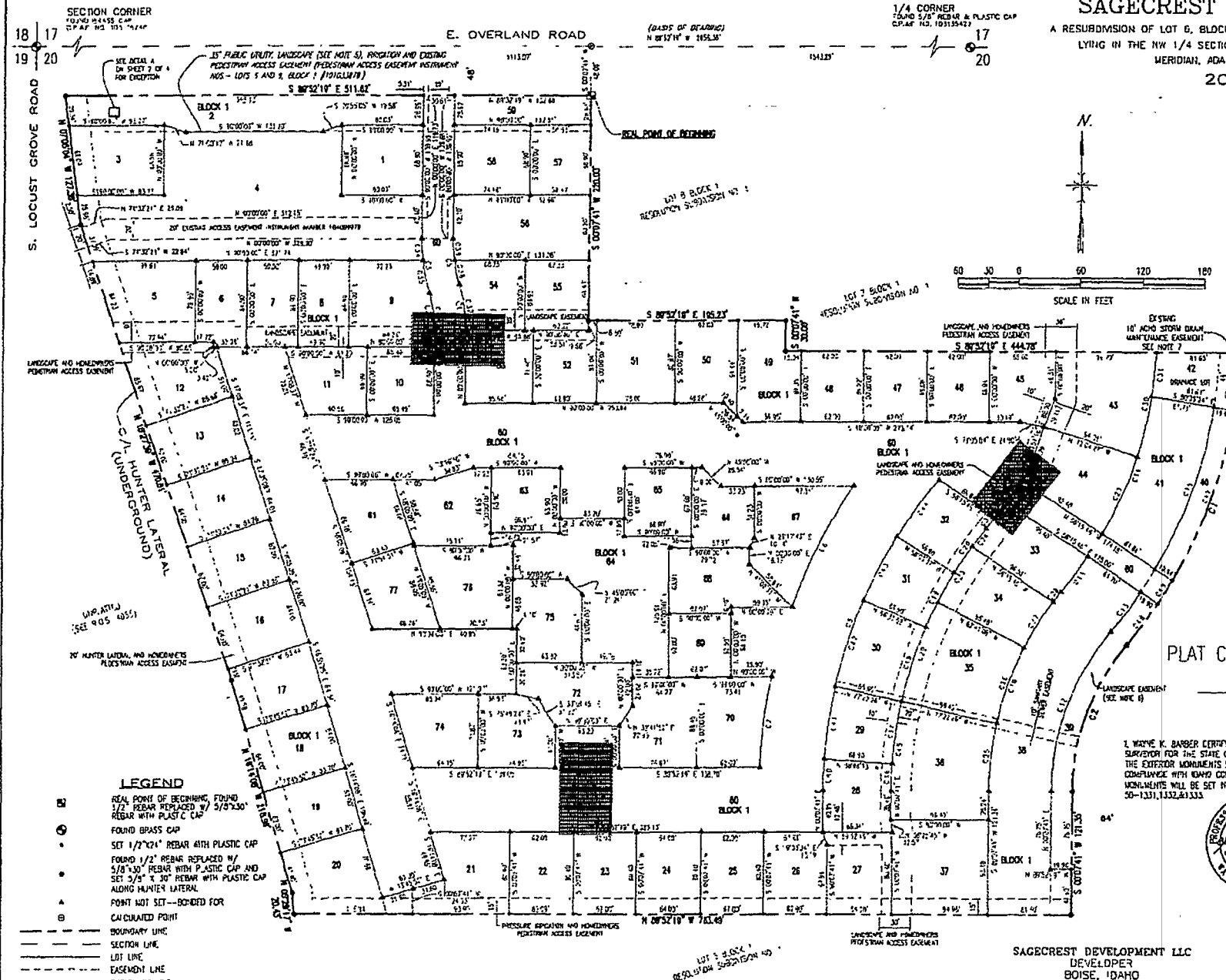
I, WAYNE K. BARBER CERTIFY THAT I AM A PROFESSIONAL LAND SURVEYOR FOR THE STATE OF IDAHO, AND DO HEREBY CERTIFY THAT THE EXISTING MONUMENTS SHOWN ON THIS PLAT ARE SET IN COMPLIANCE WITH IDAHO CODE 50-1303 AND THAT THE INTERIOR MONUMENTS WILL BE SET IN COMPLIANCE WITH IDAHO CODE 50-1331, 1332, 1333.



BRIGGS ENGINEERING, INC.
 CONSULTING ENGINEERS
 BOISE, IDAHO

SHEET 1 OF 4
 3416-PL-204 08/23/04

SAGECREST DEVELOPMENT LLC
 DEVELOPER
 BOISE, IDAHO



LEGEND

- REAL POINT OF BEGINNING, FOUND 1/2" REBAR REPLACED w/ 5/8" 330° REBAR WITH PLASTIC CAP
- FOUND BRASS CAP
- SET 1/2" 330° REBAR WITH PLASTIC CAP
- FOUND 1/2" REBAR REPLACED w/ 5/8" 330° REBAR WITH PLASTIC CAP
- SET 5/8" 330° REBAR WITH PLASTIC CAP
- ALONG HUNTER LATERAL
- POINT NOT SET—BONDED FOR CALCULATED POINT
- BOUNDARY LINE
- SECTION LINE
- LOT LINE
- EASEMENT LINE
- SURVEY DATUM LINE

Affidavit of Robert A. Mills in
Opposition to Sagecrest POA's
Motion for Summary Judgment

EXHIBIT B

To: -Sagecrestpoa[Sagecrestpoa@yahoo.com]
From: SageCrest Poa
Sent: Wed 8/18/2010 8:22:28 PM
Subject: Preventive Maintenance for your Building
PRV-Express Bid-8-2010.pdf

Attention Owners:

Several owners have asked what can be done to prevent the flooding problems associated with the heating/cooling systems at Sagecrest. Your association has been working diligently on a solution to help prevent the possible flooding of units from broken coils in the heating system and water heater failures. After much research and many discussions, preventative maintenance is recommended as the best solution to avoid potential problems.

1. Install freeze-stats on the A/C coils to prevent freezing of the water lines within the coils that provide heat during winter. Note: the coils freeze in the summer time from A/C unit icing. This install is done by an HVAC vendor and has been suggested several times in the past.

2. Install a PRV (Pressure Regulator Valve) on the main incoming water line to the building. Please view the attached quote for details of what is covered.

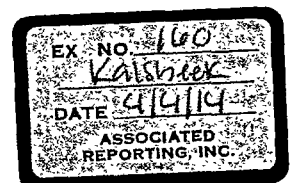
These are preventive maintenance items that owners are highly recommended to have done. The cost of losing a unit to flooding is greater than the installation of these items.

If you would like to schedule these installs, please contact:

Sheila at FRPM at "Sheila Thomason" <Sheila@FRPMRENTALS.COM>, or call FRPM at 208.577.1900 or myself for any questions, thank you!

Your association working for you!

Jon
Association President
925-228-7000



CONFIDENTIAL

SPOA000676

000321

Affidavit of Robert A. Mills in
Opposition to Sagecrest POA's
Motion for Summary Judgment



EXHIBIT C

From: VJK <aire1@pacbell.net>
Sent: Thursday, August 04, 2011 8:03 PM
To: Bill Raff
Cc: Tony Drost; Sheila Thomason; Beth
Subject: Re: Professional inspection.

Thank you for taking an interest in the matter and making suggestions to find solutions. Agreed Bill, to pool resources is very beneficial to all. The WH and many other issues like PRV's, expansion tanks, filters, sewers, pool, and landscape all have been resolved in this manner. The board has been advised of the WH situation and is reviewing the options based on Express Plumbing, Gas company, Sheila's, and other resources - all played a part in researching this issue. Due to the possible hazardous conditions that have been created, the changing of WH is needed in some units immediately, this action is being taken. As for a long term fix, the research shows - The new WH have a larger exhaust vent and this matches the size of the existing flue; the vents for intake air on the new WH are not under the WH they are on the sides, better design and wall vents are being researched to see the possibility of enlarging them; the cleanliness of the area is more difficult - at this time arrangements are being made to check the WH area each time the HVAC filters are changed; we have discussed a short wall to prevent lint and dust from entering the WH area - at this time they tell me this is not the best because lint and dust are airborne, not sure I agree with this answer; CO2 monitors are being installed and a discussion of temp. or permanent, battery or AC powered, and how to ensure the tenant is protected as well as the owner. The POA and FRPM have also researched out the builders insurance, bonds, building codes, water heater warranties, and several other recourse actions to no avail, still searching for a source to pay for poor building quality of the complex.

As you can see there has been a lot of research into this issue and solutions are being implemented. Yes, Sheila has done a great job on keeping people informed and enacting the solutions thus far. There is the possibility of having Stan review the situation and give impute, we will see what happens. The POA is and has been proactive in following through with finding cost effective solutions for all owners. Hence, if an owner would like to go beyond what the POA and FRPM is doing, then they certainly may(at their cost), at this time we believe every option and solution is being reviewed for viability. We do not want this to happen in the future.

The board is reviewing the information and have been informed of your suggestions, should they feel that additional research is necessary, we will not hesitate to obtain any information from any source available. As always, your impute is important and appreciated, good to hear from you.

 *Virginia and Jon* 

--- On Thu, 8/4/11, Bill Raff <wmraffdesigns@yahoo.com> wrote:

From: Bill Raff <wmraffdesigns@yahoo.com>
Subject: Professional inspection.
To: "Jon Kalsbek" <aire1@pacbell.net>
Cc: "Tony Drost" <Tony@FRPMRENTALS.COM>, "Sheila@FRPMRENTALS.COM" <Sheila@FRPMRENTALS.COM>, "Beth" <raffbeth@yahoo.com>
Date: Thursday, August 4, 2011, 11:13 AM

CONFIDENTIAL



FR01755
000323

Jon,

While the WH's are the owners responsibility, the original design flaw affects all of the owners. Don't you think it would be most economical to have a professional look at the situation and for the cost of an individual evaluation benefit all the owner's? If I decide to have an appraisal made by a professional on my single unit, I suppose I could be nice and share my findings with all those that own the same floor plan, but why should I have to, it seems to me that this is exactly what an association is for, pooling our resources when the group will benefit. It seems just a matter of time before all of the units will get notice that they need the WH's replaced for the same reason.

If you know of any owner's that have solved their problem already, perhaps they could share their approach?

This is a potentially serious problem with enormous consequence to all owners and the association. We need to handle it as such and proceed as a unified body in case there are any legal repercussions.

I would appreciate it if as President Jon, you would bring all the owners into a discussion on this so that we can understand the feelings of others and work together on a solution that will protect our interests as a whole.

By the way, I think Sheila (and FRPM) is (are) doing a great job on this and I appreciate her (their) efforts. Thank you Sheila and FRPM.

Thank you Jon in advance,

Bill Raff
Santa Fe Springs, CA 90670
562 331 8355 Direct
562 868 2814 Fax

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FR01756
000324

Affidavit of Robert A. Mills in
Opposition to Sagecrest POA's
Motion for Summary Judgment

EXHIBIT D

1 Q. At any time, did you work for a natural
2 gas company?
3 A. No.
4 Q. Have you ever worked with a company --
5 Let me scratch that and ask you a better
6 question.
7 Have you ever had any specific carbon
8 monoxide related training as it applies to testing
9 or detecting?
10 A. No.
11 Q. I understand you're the president of the
12 Sagecrest Property Owners' Association.
13 Is that correct?
14 A. Yes.
15 Q. How long have you been a member -- or
16 the president? Excuse me.
17 A. President or member?
18 Q. Well, I'll ask you both.
19 A. Okay.
20 Q. How long have you been president?
21 A. They're pretty close in that time.
22 So from 2008, 2009, 2010, 2011, 2012,
23 2013 to present.
24 Q. Okay.
25 A. So what's that? Six years.

[Page 24]

1 Q. Okay. And you said --
2 MR. ANDERSON: I couldn't understand that
3 question.
4 Is that since he's owned property or
5 been the president?
6 MR. CLARK: Yeah. I asked him how long he's
7 been the president of the POA.
8 Q. (BY MR. CLARK) How long have you been on
9 the board of the Sagecrest POA?
10 MR. FUHRMAN: Eric, can you speak up a
11 little bit?
12 MR. CLARK: I'm sorry.
13 MR. FUHRMAN: You're really speaking
14 quietly.
15 THE WITNESS: Okay. That was the board.
16 Q. (BY MR. CLARK) Okay.
17 A. From 2008.
18 Q. Okay. How long have you been a member
19 of the Sagecrest POA?
20 A. From 2007, so that would be one more
21 year. What, seven years?
22 Q. Okay. Do you have to own property at
23 Sagecrest to be a member of the board?
24 A. At what point in time?
25 Q. I guess by your response, was there --

[Page 25]

1 Did that criteria change at some point?
2 A. Yes, it did.
3 Q. Okay. When did that criteria change?
4 A. November 5th, 2012.
5 Q. And how did that criteria change?
6 A. The CC&Rs were amended.
7 Q. And what was the amendment?
8 A. There were numerous amendments.
9 Q. Well, I'm --
10 With regard to the ownership of
11 property, do you now have to own property?
12 A. You have to own property in Sagecrest to
13 be on the board.
14 Q. Okay. Prior to November 5th, 2012, you
15 did not have to own property to be --
16 A. You did not.
17 THE REPORTER: Make sure you let him finish
18 his question before you start answering.
19 THE WITNESS: Oh, I'm sorry.
20 THE REPORTER: Thank you.
21 Q. (BY MR. CLARK) How did you hear about
22 McQuen's death?
23 A. A phone call.
24 Q. From who?
25 A. Lizz Loop.

[Page 26]

1 Q. What did she tell you?
2 A. She said there was a death at the
3 complex.
4 Q. Did she tell you what caused the death?
5 A. I don't recall the exact wording of it.
6 I believe it was just there was a death at the
7 complex.
8 Q. Okay. When did she call you?
9 A. I believe it was around the noon hour,
10 1:00 on -- I'm pretty sure it was Saturday, the
11 10th. I could be wrong on that --
12 Q. Okay.
13 A. -- date, but --
14 Q. What did you do after receiving Lizz's
15 phone call?
16 A. I called the board members.
17 Q. And just for the record, will you
18 identify those -- your fellow board members?
19 A. There is Jay Arla, David Meisner, Chris
20 Schwab.
21 Q. Okay.
22 A. Christopher.
23 Q. You said you called the board.
24 Is that correct?
25 A. Yes.

[Page 27]

[12] (Pages 24 to 27)

<p>1 You say, "The fix is to replace the 2 problem units with a new design water heater." 3 What are you trying to fix? What are 4 you referring to with "the fix"? 5 A. Replacing hazardous water heater units 6 that Sheila had identified with a new design of a 7 water heater. 8 Q. Okay. Do you recall what the new -- 9 that new design water heater was, the type or 10 anything? 11 A. Yes. It's a Rheem. 12 Q. Okay. 13 A. I do not remember the model number, but 14 it was a Rheem water heater. 15 Q. Additionally, it says, "The long-term 16 fix is having approved water heaters in the 17 location that is kept clean." 18 What were you referring to with that 19 statement? 20 A. The previous information that I had at 21 that time was that the issue was dust, lint, dirt 22 on the floor, and the area was not being kept clean 23 around the water heater. 24 Q. Okay. You say, "In addition, Sheila and 25 us discussed the need to install CO2 monitors in [Page 76]</p>	<p>1 Q. 107. 2 A. 107? 3 Q. Yep, second page. The water heaters 4 listed under properties. 5 A. July 29th, 2011, 14:44 p.m. 6 Q. And you're referring to Exhibit 7, 7 second page? 8 A. 107. 9 Q. 107, excuse me, the bottom of the page, 10 Sheila's e-mail. 11 Is that accurate? 12 A. Second page, bottom of the page, yes. 13 Q. Okay. And you say, "Since the letter 14 went out without the POA seeing it first." 15 Again, was it your expectation that 16 Sheila would present that type of letter to the POA 17 for approval before sending it out to the owners? 18 A. She said this was a -- a major problem 19 out there, and I had asked her to send it to me so 20 that I could look at it because what she had done 21 was put my name as a contact person on the bottom 22 of it. 23 Q. Okay. 24 A. And all I wanted to do was to know in 25 case I got phone calls. [Page 78]</p>
<p>1 each unit. Still waiting to hear if this is going 2 to be done." Who -- 3 Was it my understanding even if the 4 water heaters were changed, you believed there was 5 a need to install a carbon monoxide detector? 6 A. Yes. 7 Q. And you say, "Still waiting to hear if 8 this is going to be done." 9 Who are you waiting to hear from? 10 A. Sheila. 11 Q. So at this point in time, you -- your 12 expectation is First Rate Property Management is 13 going to decide whether or not to install permanent 14 carbon monoxide detectors? 15 A. Yes. 16 MR. ANDERSON: Form. 17 Q. (BY MR. CLARK) You also say, "Just tried 18 to stay in the loop since the letter went out 19 without the POA seeing it first." 20 Did you expect -- 21 Let me ask you just for foundation: 22 Were you referring to the, "Water heater needs 23 replaced ASAP," Sheila's e-mail earlier? 24 A. Referring to the previous e-mail and 25 date that was stated, and I don't find it. [Page 77]</p>	<p>1 Q. Would you take a look at Exhibit 110 for 2 me. 3 A. Yes. 4 Q. Have you seen that document before? 5 A. Yes. 6 Q. And it appears to me to be a response to 7 Bill Raff's e-mail that begins at the bottom of 8 page 1 of Exhibit 110. 9 Is that right? 10 A. Yes. 11 Q. And on the second page, Mr. Raff says, 12 "This is a potentially serious problem with 13 enormous consequences to all owners and the 14 association." 15 Did you agree with Mr. Raff's statement 16 then? 17 A. Yes. 18 Q. Okay. On the first page -- 19 And what did you understand Mr. Raff was 20 referring to with regard to this potentially 21 serious problem? 22 A. The CO entering a unit. 23 Q. Okay. From water heaters. 24 Is that correct? 25 A. From what had been identified from [Page 79]</p>

[25] (Pages 76 to 79)

<p>1 Q. As of the date of when you brought on 2 H&H Property Management? 3 A. That is correct. 4 Q. Okay. And just so the record is clear, 5 as Mr. Howell noted, it's 153, and that last page 6 has a Bates stamp of SPOA 002952. 7 MR. HOWELL: Yes. 8 Q. (BY MR. HAMAN) Okay. This is a 9 particular amendment for the management company of 10 H&H, correct? 11 A. Yes. 12 Q. Was there one done for First Rate when 13 First Rate came on in the early part of 2010? 14 A. There was not an amendment, no. 15 Q. Okay. Is it reasonable to assume that 16 this would apply to any management company -- 17 MR. ANDERSON: Form. 18 Q. (BY MR. HAMAN) -- that worked or that 19 contracted with Sagecrest? 20 A. I -- 21 MR. ANDERSON: Form. 22 THE WITNESS: I don't understand "would 23 apply." 24 Q. (BY MR. HAMAN) The content of it, the 25 subject matter of that amendment is basically</p> <p style="text-align: right;">[Page 280]</p>	<p>1 MR. HOWELL: Objection; form, calls for a 2 legal conclusion, documents speak for themselves. 3 Go ahead. 4 THE WITNESS: If I understand your 5 question -- 6 MR. ELIA: Join. 7 MR. HOWELL: Did you say "amen"? 8 MR. ELIA: I said "join." 9 MR. HOWELL: Oh. I thought you said, 10 "Amen." 11 MR. HAMAN: Amen, brother. 12 Sorry. Go ahead. 13 THE WITNESS: If I understand your question 14 correctly, yes. 15 MR. HAMAN: Do you want to take a short 16 break? 17 THE WITNESS: Sure. 18 MR. HAMAN: Okay. 19 (Break taken from 10:22 a.m. to 10:24 a.m.) 20 (Deposition Exhibit No. 154 was marked.) 21 MR. HAMAN: We're back on the record. 22 To clarify after a discussion, the 23 Articles of Incorporation are Exhibit 152, the 24 CC&Rs are Exhibit 153, and the bylaws are 25 Exhibit 154.</p> <p style="text-align: right;">[Page 282]</p>
<p>1 providing that the management company or agent, and 2 in this case H&H, is to provide -- perform -- I'm 3 sorry, perform duties and services as the board 4 shall authorize. 5 Is it reasonable to assume that the 6 board also authorized other management companies, 7 including First Rate, when First Rate contracted 8 with Sagecrest? 9 A. Okay. I'm sorry. I was reading the 10 document. 11 MR. ANDERSON: Can we have the question read 12 back. 13 (Record read by reporter.) 14 THE WITNESS: I would believe so. 15 Q. (BY MR. HAMAN) Okay. And as we've 16 talked in the early part of this morning's 17 deposition, the board is authorized to manage the 18 affairs of the association and, in doing so, 19 promote the health and safety of the residents, 20 correct? 21 A. I believe so. 22 Q. Okay. So the board, including the 23 president, is responsible for the duties and 24 activities of the managing agent as it pertains to 25 the health and safety of the residents, correct?</p> <p style="text-align: right;">[Page 281]</p>	<p>1 MR. ANDERSON: Amen. 2 Q. (BY MR. HAMAN) Sir, I'm going to now 3 have you -- 4 Thank you for your patience through 5 this. 6 I'll have you turn to Plaintiff's 7 Exhibit 105. That's right there. You've got it. 8 And you recognize this as being the 9 contract with -- between Sagecrest and First Rate, 10 correct? 11 A. Yes. 12 Q. And this contract was entered into on or 13 about March 12, 2010, correct? 14 A. Yes. 15 Q. Okay. I'm going to take you to page 2, 16 Section 3.4 at the top. Why don't you take a look 17 at that, and I'll ask you some questions when 18 you're ready. 19 A. Yes. 20 Q. Okay. Generally, what does this section 21 mean to you as the president? 22 A. That the agent can take action anywhere 23 within the common area -- 24 Q. Okay. 25 A. -- if need be.</p> <p style="text-align: right;">[Page 283]</p>

[76] (Pages 280 to 283)

<p>1 A. It says Donna Nee. 2 Q. Was she the secretary or just somebody 3 who volunteered? 4 A. I believe she worked for H&H. 5 Q. Okay. With respect to the bullet points 6 I referred you to, what filter change had been 7 going on in 2009? 8 A. I believe H&H had put in place a system 9 to change the filters out on a regular basis. 10 Q. What precipitated that procedure, if you 11 know? 12 A. Flooding. 13 Q. Flooding caused by what? 14 A. Several issues that was found out over 15 the course of time. 16 One was high Meridian water pressure. 17 Another one was freezing of coils in the heating 18 system. Another one was the expansion tank. And 19 there was one more that I -- 20 There were four of them, and I don't 21 recall the fourth. 22 Q. And the freezing coils, were they inside 23 the air blower? 24 A. I believe so, but I'm not sure. I'm not 25 that familiar with the system.</p> <p style="text-align: right;">[Page 356]</p>	<p>1 Q. Okay. How did changing filters 2 ameliorate those problems, if you know? 3 A. From my understanding, as it was 4 explained by H&H, was that the tenants didn't 5 change filters and they slowed the air down enough 6 to freeze the coils so the air flow was reduced 7 when the air conditioner ran. 8 Q. So what did H&H do with respect to the 9 filters? 10 A. They set up a program to have -- 11 I believe the first initial started to 12 have tenants come in and pick them up and install 13 them in their units. 14 Q. Did they have to pay for the filters? 15 A. The tenants? 16 Q. Yes, sir. 17 A. I don't recall. 18 Q. As president, did you track whether or 19 not the -- 20 Well, let me back up. 21 How many filters are necessary for 22 Sagecrest in terms of the air handlers? 23 A. I believe there are 192. 24 Q. And how often was H&H changing them? 25 A. I don't remember now.</p> <p style="text-align: right;">[Page 358]</p>
<p>1 Q. Air handler? 2 A. (Witness indicates.) 3 Q. And the expansion tank, where is that 4 located? 5 A. It's above -- 6 When I've seen them, it's above the 7 water heater, but it can be -- 8 I really don't know. 9 Q. Okay. Did your units not have these 10 problems? 11 A. Our units have not had these problems. 12 Q. Okay. So the coils are inside a unit, 13 and the expansion tank is inside a unit or various 14 units? 15 A. I believe so. 16 Q. In Meridian, I think all units have to 17 have expansion tanks. 18 Is that your understanding? 19 A. I don't know that. 20 Q. What were the other two problems that 21 precipitated the filter change procedure being 22 implemented? 23 You said freezing coils and expansion 24 tank issues. 25 A. The high water pressure in Meridian.</p> <p style="text-align: right;">[Page 357]</p>	<p>1 Q. And from what you're saying, I'm getting 2 the impression that this was H&H that came up with 3 this idea and not the board? 4 A. That is correct. 5 Q. And that's because you recall the events 6 surrounding this? 7 A. Yes. 8 Q. Okay. Did H&H charge the board, or the 9 association more appropriately, for the filters it 10 provided to the tenants? 11 A. The H&H proposal, as I remember it, was 12 that they wanted to buy them in bulk to get a 13 reduced price because they were an unusual size 14 filter, and the association picked up that bill to 15 buy them in bulk. 16 Q. Okay. So the association used funds 17 from the association's bank account to purchase 18 items for the interiors of all of the units at 19 Sagecrest? 20 A. Because -- 21 Q. Just "yes" or "no." 22 A. Yes. 23 Q. Okay. And you were going to add 24 something. I won't stop you. I just want to make 25 sure you answer my question first.</p> <p style="text-align: right;">[Page 359]</p>

[95] (Pages 356 to 359)

<p>1 A. H&H could not figure out how to charge 2 individual owners -- 3 Q. Okay. 4 A. -- to break it down. 5 Q. All right. They couldn't -- 6 Did they talk with you about that, that 7 issue? 8 A. I said, "It's an owner issue." 9 Q. Okay. 10 A. And they said, "Well, we're buying them 11 in bulk to save price. We can't charge each 12 individual owner. We can't figure it out in our 13 accounting system." 14 Q. Okay. So the association picked up the 15 tab? 16 A. Yes. 17 Q. And this was a problem that affected the 18 complex? It was a complex-wide problem? 19 A. Yes, it was. 20 Q. A global problem, I guess, would be 21 another way to call it? 22 A. If -- if -- if you like, yes. 23 Q. Okay. I may use that term. 24 A. Okay. 25 Q. So you understand what I'm talking [Page 360]</p>	<p>1 because they were getting dirty? 2 A. I was not aware of any complaints. 3 Q. Were you -- 4 Who was doing the cleaning of the water 5 heaters? 6 A. I don't know at this time. H&H handled 7 that. 8 Q. All right. And if H&H was handling 9 that, do you know how they charged for the time? 10 A. They charged the owner, if I remember 11 correctly. 12 Q. Okay. So if we go back to H&H records, 13 we'll find, I guess, individual bills to the owners 14 for water heater cleaning? 15 A. I don't know that for a fact, but I 16 believe so. 17 Q. Okay. And it's the same company that 18 couldn't charge individual, I guess, tenants for 19 the filters? 20 A. Because -- because they wanted to write 21 one check. They write a check -- 22 However their system works. 23 Q. "They" is H&H? 24 A. H&H. 25 Q. Okay. And it says, "Unit turnaround." [Page 362]</p>
<p>1 about, complex-wide? 2 A. Yes. 3 Q. With respect to the expansion tanks, 4 what was the -- what was done there? 5 Was there any kind of a wholesale 6 replacement of expansion tanks? 7 A. No, there was not. 8 Q. If you return to Exhibit 155, on those 9 bullet points I referenced on the second page, it 10 says, "We need to start cleaning the heating dryer 11 vent and the water heater as part of the unit 12 turnaround." 13 What prompted that? 14 A. At this time, I don't recall what that 15 was, but it was -- 16 Something was brought up at the annual 17 meeting to discuss with owners. 18 Q. Okay. Would you review these minutes 19 before they went out? 20 A. I -- 21 Q. Was that part of your function as 22 president? 23 A. I believe so. 24 Q. All right. Had there been complaints 25 about the water heaters not operating properly [Page 361]</p>	<p>1 What did you understand the term 2 "turnaround" to be? 3 A. That would be a lease renewal or a new 4 tenant. 5 Q. Where did you get the component of that 6 answer of lease renewal as opposed to when one 7 tenant leaves, vacates the premises and another one 8 is coming in? 9 A. The lease renewal? 10 Q. Yes, sir. 11 A. It's a term that I've seen. 12 Q. Okay. Did H&H have any different 13 procedures if -- 14 If somebody is in it -- an apartment and 15 they decide to renew the lease, did H&H have 16 special procedures on the date of renewal to come 17 in and do anything within the apartment? 18 MR. HOWELL: To his knowledge? 19 Objection; form. 20 MR. ANDERSON: Of course. 21 Q. (BY MR. ANDERSON) Every question I ask 22 is based on your knowledge. 23 A. I don't know what they were, but I 24 believe they had a system for turnarounds and lease 25 renewals. [Page 363]</p>

[96] (Pages 360 to 363)

<p>1 A. The reimbursement of it, yes. 2 Q. Tell me what you mean by 3 "reimbursement." 4 A. That the on-site manager was an employee 5 of First Rate and the POA agreed to reimburse 6 First Rate for those costs. 7 Q. Do you still have 105 in front of you, 8 the contract with the POA? 9 A. Uh-huh. 10 Q. Go to the second page. I'm sorry, third 11 page. It talks about compensation -- 12 A. Okay. 13 Q. -- under Section 6. 14 Did these line items in Section 6 change 15 at some point in time? For example, the sum of 16 \$150 as agent's monthly management fee, was that 17 ever increased? 18 A. It was not, that I know of, except at 19 the termination. 20 Q. Do you know if the advertising costs 21 were ever changed in 6.2.5? 22 A. I believe they might have been. 23 Q. Okay. Was there an amendment to this 24 contract to reflect that change? 25 A. I don't believe so.</p> <p style="text-align: right;">[Page 392]</p>	<p>1 Q. So if, for example, you asked for 2 certain activities to be undertaken by First Rate 3 employees, the association would pay for it? 4 A. I believe so. 5 Q. Okay. And if the association paid for 6 it -- 7 For example, filter changes. Those -- 8 those, in some form or another, had been continual 9 from the time you bought -- or let's say from 2009 10 on? 11 A. I believe so. 12 Q. And filter changes involved, at a 13 subsequent point in time, First Rate employees 14 actually going into the units and changing the 15 filters on a periodic basis? 16 A. I believe so. 17 Q. And those efforts were paid for by the 18 association, reimbursed? 19 A. Reimbursed. 20 Q. Okay. Not charged to each individual 21 owner? 22 A. That changed in 2012 for the filters. 23 Q. Was it January 1, 2013? 24 A. I thought it was October 2012. But it 25 was for the 2000 --</p> <p style="text-align: right;">[Page 394]</p>
<p>1 Q. It was just discussed and put into place 2 and became a course-of-business-type situation? 3 A. It was the setup that First Rate had, 4 the -- the -- the advertising they had put in 5 place, and I believe it cost more than what is on 6 this paper. 7 Q. Okay. And so that amount was changed 8 without the benefit of an amendment to the 9 contract, executed by both parties? 10 A. It appears. 11 Q. Okay. Are you aware of other changes in 12 this contract that were handled in the same manner? 13 A. Not that I know of. 14 Q. All right. In 5.1, it talks about the 15 fully burdened cost of the agent's on-site 16 employees. 17 A. Uh-huh. 18 Q. Is that what you were referring to as 19 the cost that the association would bear? 20 A. I believe so. 21 Q. It references 30 hours per week for two 22 part-time employees. 23 Was there a cap as to what the 24 association was responsible for? 25 A. No, I don't believe there was a cap.</p> <p style="text-align: right;">[Page 393]</p>	<p>1 I guess if you go from year to year for 2 the fiscal year. 3 Q. Okay. We can check. We'll get there 4 eventually. 5 Did you monitor the costs of First Rate 6 employees to make sure that the line item on the 7 budget for First Rate wasn't exceeded? 8 A. As the budget works, you either know if 9 you're over or under and what your overage is and 10 how it's going to affect at the end of the year. 11 So I monitored whether we were over or 12 under. 13 Q. Did you keep a spreadsheet, an 14 Excel-type spreadsheet, on a monthly basis so you 15 could track that kind of information? 16 A. Not on a monthly basis that I know of. 17 Q. On what type of basis? Quarterly? 18 A. Well, it -- it could very well have been 19 monthly. 20 Q. Okay. 21 (Deposition Exhibit No. 160 was marked.) 22 Q. (BY MR. ANDERSON) Exhibit 160 is an 23 e-mail from the Sagecrest POA dated August 18th, 24 2010. 25 MR. HOWELL: We've got a little issue here.</p> <p style="text-align: right;">[Page 395]</p>

[104] (Pages 392 to 395)

<p>1 Hold on. Let's go off the record. 2 (Discussion held off the record.) 3 Q. (BY MR. ANDERSON) Do you recognize this 4 e-mail? 5 A. I believe so. 6 Q. What is a PRV? 7 A. I believe that is a pressure regulator 8 valve. 9 Q. And was that one of the solutions to 10 this flooding that you've mentioned a couple times 11 recently in your testimony? 12 A. I believe so. 13 Q. Okay. What were you trying to impart to 14 the owners at this time? 15 Let me rephrase that because it speaks 16 for itself. 17 Were you taking this opportunity, as the 18 president of the POA, to make recommendations to 19 owners with respect to their individual units? 20 A. I was bringing the attention of -- of 21 what the management company had found to be 22 solutions. 23 Q. Was the installation of freeze stats on 24 the AC coils something that each owner needed to 25 bear the cost of?</p> <p style="text-align: right;">[Page 396]</p>	<p>1 Q. And why is that relevant, that we're in 2 a transition period? 3 A. The -- the -- 4 To bring it to the owners' attention 5 that this work is up to them. 6 Q. Was this a complex-wide situation? 7 A. I believe it was. 8 Q. So it's a global issue? 9 A. As you could classify it as, yes. 10 Q. And this was the board acting on a 11 global issue for the benefit of the owners? 12 A. To inform them, yes. 13 Q. Okay. And you felt that that was 14 carrying out your duties as the president of the 15 POA? 16 A. Trying to help them, yes. 17 Q. Okay. 18 MR. HOWELL: Are you moving on to another 19 exhibit, Rob? 20 MR. ANDERSON: Yes, unfortunately. 21 MR. HOWELL: We've been at it for about an 22 hour and 20 minutes. Let's take a break. 23 MR. ANDERSON: Sure. 24 (Break taken from 2:25 p.m. to 2:39 p.m.) 25 (Deposition Exhibit No. 161 was marked.)</p> <p style="text-align: right;">[Page 398]</p>
<p>1 A. Yes. 2 Q. Was the installation of a pressure 3 regulator valve something that each individual 4 owner of a building needed to pay for? 5 A. Yes. 6 Q. So this was information that the board 7 felt was important for each of the building owners 8 to know about? 9 A. Yes. 10 Q. Why did you send this out? Why did you 11 use this medium of an e-mail to inform owners about 12 the situation of floods within the units? 13 A. This was happening at the transition, 14 and this one happened to contain an Express bid for 15 doing the work. 16 Q. And the transition between H&H and 17 First Rate? 18 A. H&H and -- 19 Yes. 20 Q. Okay. This is -- by my count, this is 21 about five months later. 22 A. Yeah. It was in that -- after it, as 23 they took over. 24 Q. Okay. So -- 25 A. Trying to be helpful.</p> <p style="text-align: right;">[Page 397]</p>	<p>1 Q. (BY MR. ANDERSON) I'll hand you 2 Exhibit 161, which is an August 18th, 2010, e-mail. 3 Is this an example of you communicating 4 with other board members on certain matters? 5 A. I don't recall it. 6 Q. Oh, you don't recall it at all? 7 A. No, I don't recall this one at all. 8 Q. It looks like you're writing to Chris 9 Schwab and Jay Arla, who were on the board with 10 you. 11 Is that correct? 12 A. Yes. 13 Q. In addition to an e-mail to various 14 owners like we looked at in 160, it looks like you 15 had come up with a different solution for 16 communicating about global issues with the various 17 owners, and that would be to put an additional page 18 in their monthly statement. 19 Am I reading that correctly? 20 A. Well, this one was sent to me, I 21 believe. 22 Q. Okay. 23 A. If I read it right. 24 Q. To you from Jay. You're right. 25 In any event, it showed that the board</p> <p style="text-align: right;">[Page 399]</p>

[105] (Pages 396 to 399)

<p>1 To the extent you've prepared something 2 for your attorney, do not answer that question. 3 MR. ANDERSON: Well, he can say "yes" or 4 "no," and then I'll stop. 5 MR. HOWELL: Good point. Good point. 6 But just be -- just answer his question 7 and then only "yes" or "no" and then move on. Wait 8 for the next question. Don't volunteer additional 9 information. 10 MR. ANDERSON: There you go. 11 THE WITNESS: Yes. 12 Q. (BY MR. ANDERSON) Okay. You prepared 13 it for your attorney? 14 A. Yes. 15 Q. Okay. Did you ever prepare a timeline 16 for your own edification so that you could have 17 something to kind of use as a cheat sheet as you go 18 through all this stuff? A little chronology or -- 19 And I'm extracting -- I'm excluding from 20 that something you've prepared for your attorney. 21 I'm just asking for something for your own use. 22 A. Whatever I prepared was for the 23 attorney. 24 Q. Okay. So when you say, "I don't believe 25 there was an e-mail," that's based on your</p> <p>[Page 408]</p>	<p>1 then I believe it's February 2011 from the daily 2 log marked as Exhibit 167. 3 Was this the degree of detail that you 4 wanted every month from First Rate in the daily 5 log? And I'm referring to 167. 6 A. My recollection is no. 7 Q. What level of detail did you want? 8 A. Like I had mentioned, just stuff that 9 dealt with the common area. 10 Q. And presumably, you weren't in Boise in 11 February of 2011. 12 Is that correct? 13 A. I couldn't tell you at this time. 14 Q. Would you have communicated via e-mail 15 if you had wanted to stop this level of detail and 16 only get to common area issues? 17 A. It might have been done in a phone call. 18 Q. Okay. Are you the type of person that 19 likes to confirm phone calls, follow up on phone 20 calls if whatever you talked about isn't happening? 21 A. If it's available, yes. 22 Q. And do you typically follow up with an 23 e-mail for the confirmation? 24 A. If I have the opportunity to, yes. 25 Q. Okay. One question I didn't understand</p> <p>[Page 410]</p>
<p>1 recollection of -- or your review of these various, 2 whatever you looked at, binders or whatever, 3 correct? 4 A. I don't believe there was an e-mail on 5 what? 6 Q. Telling First Rate not to include 7 anything in the daily log that did not involve the 8 common areas. 9 MR. HOWELL: I think that misstates his 10 testimony, Rob. 11 THE WITNESS: I believe I said I don't know 12 if there's an e-mail. 13 MR. ANDERSON: Okay. All right. 14 (Deposition Exhibit Nos. 165 and 166 were marked.) 15 Q. (BY MR. ANDERSON) I'm going to hand you 16 165, and I'm going to hand you 166. That has to do 17 with the daily log in the October 2010 period. 18 MR. HOWELL: Rob, I'm going to make those a 19 little cleaner. 20 Is that okay? 21 MR. ANDERSON: Yes. 22 I'm going to do one more, 167. 23 (Deposition Exhibit No. 167 was marked.) 24 Q. (BY MR. ANDERSON) I've given you a 25 series of two e-mails, Exhibits 165 and 166, and</p> <p>[Page 409]</p>	<p>1 from your discussions with Mr. Haman, when you're 2 on the road in your motor home, do you have the 3 ability to get on the internet inside your motor 4 home, or do you have to go to someplace that has 5 that capability? 6 A. That all depends on service. 7 Q. Right. 8 A. So the answer to your question is yes, 9 variably. 10 Q. Okay. So if you wanted to stay in touch 11 via the internet while you're on the road, it 12 just -- it's hit or miss sometimes? 13 A. Yes. 14 Q. Was part of your travel routine to try 15 to find a place that was Wi-Fi so that you could 16 catch up? 17 A. When available, yes. 18 (Deposition Exhibit No. 168 was marked.) 19 Q. (BY MR. ANDERSON) Exhibit 168 is an 20 October 8th, 2010, set of minutes from a board 21 meeting. 22 I'm sorry. I think this would be the 23 annual members' meeting. 24 Is that correct? 25 A. Appears to be.</p> <p>[Page 411]</p>

[108] (Pages 408 to 411)

<p>1 Q. What did you understand the purpose of 2 the owners' meetings to be? 3 A. Review the information, how the property 4 was doing, inform owners, and -- informational and 5 then voting on certain items. 6 Q. Okay. Did you understand that the 7 purpose of the annual members' meeting was to only 8 talk about common area issues? 9 A. No. If there were issues that related 10 to owners, that was also covered. 11 Q. Okay. Did you find that the annual 12 members' meeting was a good vehicle for 13 communicating with the owners relative to 14 complex-wide issues? 15 A. I believe so. 16 Q. Okay. It was another tool that the POA 17 had for communicating about global issues with 18 owners? 19 A. I believe so. 20 Q. And if we turn in Exhibit 168 to the 21 second page, down near the bottom, it appears that 22 there are some entries regarding the filters. 23 That would be a global issue, correct? 24 A. As you've defined it, yes. 25 Q. Freeze stats, that would be a global [Page 412]</p>	<p>1 Q. Okay. And you thought it was important 2 to give them as much information as possible so 3 they could make that choice in an educated way? 4 A. So that they -- 5 Yes. 6 Q. All right. And then on the top of the 7 third page, we see the expansion tank issue again. 8 And maybe this will help you recall something about 9 it. 10 Do you have any recollection that 11 equipment inside individual units was starting to 12 fail because of age and -- I think you described it 13 as high water pressure in Meridian. 14 A. I have no knowledge of age. 15 Q. All right. But, again, it fell within 16 the context of a global issue? 17 A. It was an issue for owners to -- to have 18 information on. 19 Q. Okay. Who prepared these minutes? 20 A. It doesn't say. I cannot be sure. 21 Q. I'm interested in that. 22 Was there somebody that you can 23 recall -- 24 This is 2010, so we've only had two so 25 far that we've talked about, and we're going to [Page 414]</p>
<p>1 issue involving equipment in individual units, 2 correct? 3 A. These were items that the owners had 4 free choice on. 5 Q. Had what? 6 A. Free choice. 7 Q. Okay. 8 A. Whether they wanted to do them or not do 9 them. It was just an -- information. 10 Q. Right. 11 Would you agree with me that the 12 important part about information is disseminating 13 it? 14 A. Yes. 15 Q. And that's -- or the annual meeting was, 16 again, a vehicle for that dissemination? 17 A. Yes. 18 Q. Which the board POA took advantage of? 19 A. Yes. 20 Q. And at the bottom of the second page, we 21 also see pressure regulator valves. 22 Those were -- that was a complex-wide 23 issue? 24 A. It was a solution for owners to choose 25 as they would. [Page 413]</p>	<p>1 talk about 2011 and 2012? 2 Was there somebody who typically took 3 minutes, say the treasurer or the secretary? 4 A. Tony Drost typically took minutes. 5 Q. Okay. He would attend? 6 A. He would attend. 7 Q. And then you would review the minutes -- 8 A. The board reviewed the minutes. 9 Q. -- before they were sent out? 10 A. Yes. 11 Q. And then they were sent out to whom? 12 A. They were sent out to all members, as 13 far as I know. 14 Q. Even if they weren't in attendance? 15 A. Even if they weren't in attendance. 16 Q. Okay. And that way you could make sure 17 that if somebody hadn't been able to attend the 18 meeting, they could at least benefit from whatever 19 was discussed? 20 A. Yes. 21 (Deposition Exhibit No. 169 was marked.) 22 Q. (BY MR. ANDERSON) Exhibit 169 is an 23 e-mail dated October 12th, 2010. 24 Take a look at that, please. 25 The bottom part of the first page and [Page 415]</p>

[109] (Pages 412 to 415)

Affidavit of Robert A. Mills in
Opposition to Sagecrest POA's
Motion for Summary Judgment

EXHIBIT E

1 for, correct?
 2 A. They paid for the purchase of them, yes.
 3 Q. All right. Because it was a
 4 complex-wide problem?
 5 A. Because the management company couldn't
 6 figure out how to charge individual owners, and
 7 they wanted to get a discount on the filters since
 8 they're a special filter.
 9 Q. I understand there's reasons, but I'm
 10 just making sure that I understand correctly
 11 that -- the big picture.
 12 The association was paying for the
 13 filters because there was a complex-wide problem,
 14 true?
 15 A. The association asked the management
 16 company to charge the owners originally. They
 17 asked them to charge them. The management company
 18 said, "We can't do that."
 19 Q. Keep going, and you'll get to my
 20 question.
 21 The association paid for the filters
 22 because it was a complex-wide problem, wasn't it?
 23 A. We -- we were asked to do that, yes.
 24 Q. And in the situation involving the water
 25 heaters, you had asked First Rate under its
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1 agreement with the association to talk to vendors
 2 and try to get you information so you could present
 3 options to the owners, correct?
 4 MR. HOWELL: Objection; form.
 5 THE WITNESS: I have to think of the wording
 6 of your question.
 7 MR. ANDERSON: Let's have it read back, if
 8 that helps.
 9 THE WITNESS: Yes.
 10 (Record read by reporter.)
 11 THE WITNESS: Yes.
 12 Q. (BY MR. ANDERSON) You weren't asking
 13 each individual owner to pay for Sheila Thomason to
 14 talk to Express Plumbing, were you?
 15 A. She was being paid by First Rate.
 16 Q. Right. And First Rate was being paid by
 17 the association.
 18 A. Only for the on-site manager. Sheila's
 19 pay came from the management contracts with the
 20 owners.
 21 Q. Where do you get that information?
 22 A. She's -- she's a First Rate employee.
 23 The reimbursement that the association did was for
 24 on-site management.
 25 Q. Did you ask that First Rate segregate
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1 its time so that the investigation could be billed
 2 to each unit owner?
 3 A. I don't believe so.
 4 Q. Okay. Sheila was involved because Tara
 5 was on vacation in July, late July and early August
 6 2011, wasn't she?
 7 A. I --
 8 MR. HOWELL: If you know.
 9 THE WITNESS: I don't know.
 10 Q. (BY MR. ANDERSON) Do you recall Sheila
 11 coming over to take Tara's place while she was on
 12 vacation?
 13 A. I don't recall. We were gone, and she's
 14 the maintenance supervisor.
 15 Q. Okay. And --
 16 A. I thought she was handling it because
 17 she was the maintenance supervisor.
 18 Q. And if Tara had been there, she would
 19 have been working under the association contract,
 20 correct?
 21 A. They still --
 22 MR. HOWELL: Objection; form.
 23 Go ahead.
 24 THE WITNESS: They still had a maintenance
 25 supervisor. Sheila was the maintenance supervisor
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1 of the maintenance department.
 2 Q. (BY MR. ANDERSON) Okay. With respect to
 3 your responsibilities as the president of the POA,
 4 what did you feel were the limits, if any, to those
 5 responsibilities regarding global problems that
 6 Sagecrest, as a complex, was encountering?
 7 A. To help members in any way the
 8 association could.
 9 Q. Okay. And did that include directing
 10 First Rate to gather information?
 11 A. I wouldn't say it was directing. It was
 12 brainstorming, if you want to call it; a sounding
 13 board, however.
 14 Q. Explain that a little bit more for me.
 15 A. That you throw out ideas. They have
 16 ideas, you have ideas, owners have ideas. You
 17 throw them in and --
 18 Vendors have ideas. Intermountain Gas
 19 has ideas.
 20 Q. Okay. All right.
 21 MR. ANDERSON: Off the record.
 22 (Discussion held off the record.)
 23 (Break taken from 10:05 a.m. to 10:14 a.m.)
 24 Q. (BY MR. ANDERSON) Exhibit 183 is that
 25 list of water heater information by unit.
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1 Q. Did you not know that he had that
2 background?
3 A. I don't recall that background, but --
4 Q. Okay.
5 A. -- I'm reading it, so I must have read
6 it then.
7 Q. Okay. On or about December 22nd, 2011,
8 did you communicate with anyone at First Rate about
9 the testing procedures that had been requested of
10 them?
11 A. No. Tara had stated she had been
12 trained by Intermountain Gas and further by
13 Express.
14 Q. And after Mr. Schwab had made a detailed
15 list of protocols for testing, did you ask her if
16 she was following those based on her training?
17 A. I don't believe so. I left it to
18 First Rate to handle it.
19 Q. To handle what?
20 A. How they did that.
21 Q. Do you think it would have been helpful
22 to make sure that, in your mind, that she was
23 following the suggestions that Mr. Schwab had come
24 up with?
25 A. Would it have been helpful? Yes.
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1 Q. Based on this exchange, did the board
2 authorize the purchase of a CO tester?
3 A. Yes.
4 Q. Who actually purchased it?
5 A. I believe I did.
6 Q. Okay. Does that mean you went to a
7 store and got it or did you go online or how did
8 you do it?
9 A. If I remember correctly, I got a check
10 from First Rate and went to Grainger's and picked
11 one up, but I could be wrong in that.
12 Q. Okay.
13 A. I don't remember exactly how it came
14 about, but I'm sure it came from Grainger's.
15 Q. And you remember having it in your
16 hands?
17 A. In the box, yes.
18 Q. In the box?
19 Did you look at the box, just out of
20 curiosity, to see if there were any instructions on
21 it?
22 A. I didn't open the box, but I had the
23 box.
24 Q. Okay. Did you give it to First Rate?
25 A. Yes.
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1 Q. How did you do that?
2 A. Dropped it off at the First Rate on-site
3 office.
4 Q. Okay. Did it come with any kind of test
5 gas?
6 A. I don't know.
7 Q. Did you talk to the people at Grainger's
8 about proper calibration or operation or anything
9 like that?
10 A. No. As I stated, Tara had stated she
11 was trained by Express and it was the same model
12 that Express had --
13 Q. Okay.
14 A. -- was using.
15 Q. Did you have any discussions with her
16 after dropping it off regarding the tester?
17 A. No.
18 Q. Have you ever had any discussions with
19 her about the tester itself and the operation, the
20 use of it?
21 A. Not that I recall.
22 MR. ANDERSON: Why don't we take a quick
23 break.
24 (Break taken from 2:17 p.m. to 2:33 p.m.)
25 Q. (BY MR. ANDERSON) Mr. Kalsbeek, you're
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1 back on the record, as are we. The next event I'd
2 like to talk to you about -- or time period is
3 March of 2012.
4 What was your first awareness that there
5 had been some testing done at Sagecrest in March of
6 2012?
7 A. A phone call from Tara.
8 Q. All right. And what was the substance
9 of that phone call?
10 A. A water heater in our building tested
11 high.
12 Q. Do you remember which building tested
13 high?
14 A. It was Building 37.
15 Q. It looks like from her notes, 3724 had a
16 reading of 274.
17 Does that sound like a PPM number that
18 you might have heard?
19 A. I thought it was different than that,
20 but yes.
21 Q. Did she tell you that she was calling
22 all unit owners, property owners, to tell them
23 about the results of the testing that had occurred
24 on March 9, 2012?
25 A. No, she didn't.
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AUG 22 2014

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA**

<p>TRAVIS FORBUSH and GRETCHEN HYMAS, individually and as the natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased), and BREANNA HALOWELL,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION <i>et al.</i>,</p> <p>Defendants.</p>	<p>Case No. CV PI 1304325</p> <p>PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT SAGECREST MULTI-FAMILY PROPERTY OWNERS' ASSOCIATION, INC.'S MOTION FOR SUMMARY JUDGMENT</p>
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I. SUMMARY

On November 10, 2012, carbon monoxide (CO) gas emitted from a water heater at the Sagecrest Apartment Complex killed McQuen Forbush and seriously injured Breanna Halowell. The Sagecrest Multi-Family Property Owners' Association, Inc. (the "POA") knew about the existence, causes, and available solutions to this deadly threat since at least July of 2011 — *over sixteen months* before the poisoning.¹ The POA's negligent and reckless acts and omissions during 2011-2012, in responding to the known CO issue at Sagecrest, was a significant cause of Forbush's death and Halowell's injuries.

The POA now seeks to evade responsibility through its Motion by divorcing itself from reality and fact, while pleading that it was powerless to take any action related to unit interiors, and therefore that it could not have done anything to address the known threat, either directly or through its agent, First Rate Property Management ("FRPM"). This is patently false. The POA selected the property management agent for all aspects of the Sagecrest Apartment Complex — including unit interiors. Under the Declaration of Covenants, Conditions and Restrictions ("CCR's"), the POA had an express right to "repair, maintain an restore" unit interiors. Additionally, the POA-FRPM Contract placed a duty on FRPM to take action to protect the safety of "tenants and occupants" — by addressing hazards in unit interiors.

Moreover, the POA's current position — which it adheres to in an attempt to escape liability — is contrary to its pre-litigation course of dealings with FRPM. The POA's brief paints a different picture of the POA's actual responsibilities at Sagecrest than the evidence bears out; the POA, especially through its President Jon Kalsbeek, took primary command and control of the dangerous and negligent response to the CO issue at Sagecrest during 2011 and 2012.

¹ See, e.g., Ex. 1, FR1416-22 (POA was aware in July of 2011 of a CO poisoning event in which the tenants would have died after forty-five minutes of additional exposure); Ex. 2, Kalsbeek Dep. 219:10-15 (Kalsbeek was aware of "a serious potential health problem with carbon monoxide issues"); Ex. 3, FR444 (Kalsbeek was aware that "[t]he fix is to replace the problem units with a new design water heater"); Ex. 4, FR1672-73 (Kalsbeek was aware that "an AC/DC detector permanently installed is the best solution for C02 [*sic*] Detectors"); Ex. 15 to the Declaration of Eric R. Clark in Opposition to Defendant Switzer's Motion for Summary Judgment, FR5818-22 (summary of elevated CO readings at Sagecrest, including reading of 100 ppm CO in the apartment unit at issue here); Ex. 2, Kalsbeek Dep. 318:7-20 (Kalsbeek acknowledging that he received the summary of elevated CO readings.)

*Note: all exhibits referenced are attached to the Declaration of Eric R. Clark in Opposition to Defendant Sagecrest Multi-Family Property Owners' Association Motion for Summary Judgment unless otherwise noted.

Prior to this litigation, both the POA and FRPM understood that the POA had the authority to direct FRPM's performance with respect to "global issues" — including issues related to unit interiors and CO specifically. The POA exercised control over water heater maintenance, water heater replacement, CO testing, and the installation of hard-wired CO detectors — all of which are unit interior issues. Thus, the POA and individual unit owners exercised joint, rather than exclusive, control over unit interiors. When taking action regarding unit interiors, an individual owner and the POA together served as FRPM's co-principals, and FRPM served as a dual agent.

However, the POA's liability is not founded only on its failure to exercise reasonable care, either directly or through its agent, to prevent a foreseeable risk of death or severe injury. Even worse, the POA *affirmatively increased the danger* of a deadly CO poisoning. Mr. Kalsbeek took it upon himself to address the threat. Unfortunately, he badly botched his misguided effort. In order to cut back on expenses, he rejected a suggestion to hire a professional maintenance person to regularly clean the water heaters. Even more egregiously, Mr. Kalsbeek instituted a set of obviously flawed testing procedures that masked the danger of CO poisoning. He even hid available information from owners (and therefore, in turn, tenants and guests). Additionally, Mr. Kalsbeek and the POA instituted and then oversaw the installation of hard-wired CO detectors in unit interiors — a program that he pursued lackadaisically until after the deadly poisoning, whereupon over one hundred units received hard-wired CO detectors in a single day.

There is ample evidence from which a jury could conclude that the POA and individual owners exercised joint control over unit interiors; that the POA failed to exercise reasonable care to prevent a foreseeable risk of death and serious injury; that FRPM, in its capacity as a dual agent of the POA and the Matthew E. Switzer, Trust (the owner of the unit at issue here) also failed to exercise reasonable care; and that the POA actively contributed to the danger through voluntarily assumed duties of safety in response to the CO issue at Sagecrest. This Court should deny the POA's Motion for Summary Judgment.

II. FACTS²

A. **The POA selected FRPM as the property manger for all aspects of the Sagecrest Apartment Complex, including unit interiors.**

In its Memorandum, the POA suggests that FRPM's relationship with the POA was entirely separate from its relationship with the individual owners. On the contrary, the CCR's required the individual owners to hire a property management agent selected by the POA.³ (Ex. 2 to the Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment, CCR's at 2952 § 6.6A.) The POA actively enforced this provision. (Ex. 5, Enforcement Letter, FR5862.) As shown below, the POA's power to hire and fire a property manager for all aspects of the Sagecrest Apartment Complex gave it leverage to micromanage FRPM's performance of its duties, including with respect to unit interiors.

B. **The CCR's and POA-FRPM Contract establish that the POA and individual owners jointly controlled unit interiors.**

The CCR's provide that the POA, through its agents and employees, had a retained right to enter unit interiors to conduct maintenance, repairs, and restorations:

Failure of Owner to Maintain such Owner's Residential Lot or Four Plex: In the event the Owner of any Residential Lot improved with a Four Plex shall fail to maintain any portion of such Owner's Residential Lot that Owner is responsible to maintain, **in a manner reasonable [sic] satisfactory to the Board**, after approval by vote of at least sixty percent (60%) of the members of the Board present and voting and subject to such Owner's right to notice and a hearing before the Board, **the Association may, through its agents and employees, enter upon the Residential Lot or Four Plex and repair, maintain and restore the Residential Lot, or the Four Plex.** The cost of such repair, maintenance and restoration shall be chargeable to the Owner of such Residential Lot or Four Plex and shall constitute a lien on the Residential Lot of such Owner, collectible in the same manner as Limited Assessments under this Declaration.

² The POA asserts a number of facts without supporting citations to the record. (*See, e.g.*, Def's Memo. at 7 (two full paragraphs of factual assertions without citation).) It is the POA's burden to establish that it is entitled to judgment as a matter of law; no response is required to such unsupported assertions. To the extent that Plaintiffs do not specifically disprove any of the POA's unsupported assertions, that should not be construed as an admission or a waiver.

³ With the exception of owners who were "grandfathered" out of the requirement by virtue of having self-managed prior to the adoption of the CCR's. (Ex. 2 to the Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment, CCR's at 2952 § 6.6A.) That exception is irrelevant here.

(Ex. 2 to the Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment, CCR's, at POA2926 § 3.8 (original emphasis removed, new emphasis added).)

Similarly, the POA-FRPM Contract indicates that the POA — through its agent FRPM — had the authority to take action in unit interiors to prevent harm to tenants *and other occupants* at the Sagecrest Apartments:

3.0 DUTIES OF AGENT

* * * *

Take such action as AGENT deems reasonable and appropriate in the event of ***any* emergency** brought to AGENT's attention which may result in damage to the Property or cause ***injury to tenants and occupants*** of the Property. Notwithstanding this authority, it is understood and agreed that **AGENT will if at all possible, confer immediately with the President or other authorized officer of the ASSOCIATION regarding all emergency repairs in excess of \$300.00 without first obtaining approval of the ASSOCIATION.**

(Ex. 3 to the Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment, POA-FRPM Contract, at FR6279-6280 § 3.4 (original emphasis removed; new emphasis added).) The POA imposed duties with respect to the safety of unit interiors on FRPM, but the POA also retained control of the performance of those duties through the contract's conferral requirement. *Id.*

C. **The POA exercised significant control, and particularly over “global issues”—including those affecting unit interiors.**

Tony Drost, owner of FRPM, stated that Mr. Kalsbeek (and thereby the POA) exercised control over the management of the Sagecrest Apartments. (Ex. 6, Drost Dep. 93:14-95:19.) This control was *not* limited to unit exteriors and common areas; rather, it extended to unit interiors. Even something like replacing dishwashers — if it had to be done in multiple units — was a “global issue” for which First Rate required Mr. Kalsbeek's “permission to go forward.” (*Id.* at 239:20-240:21; *see also id.* 318:13-320:11; *see also* Ex. 7, FR302-03 (Kalsbeek “insisted that [Mr. Drost] run any global issue through [Kalsbeek]”).)

Similarly, FRPM Maintenance Director Sheila Thomason testified: “He [Kalsbeek] micromanaged things that I did on a daily basis while I was at Sagecrest that made my job a little bit more difficult. I'd have to include him on the e-mails or report to him on daily things that happened.” (Ex. 8, Thomason Dep. 66:11-17; *see also id.* at 259:19-22 (Kalsbeek

“micromanaged *everything* that we [First Rate] did” (emphasis added)). Mr. Kalsbeek made it clear that he was “in charge” of all “decisions that were made at Sagecrest.” (*Id.* at 219:18-220:12.) If anything was done without his knowledge, it was “pretty common for him to be upset.” (*Id.* at 48:21-49:3.) He liked to be made aware of every minor detail that occurred at Sagecrest, including details related to unit interiors; for example, he wanted to know about events as minor as the replacement of a broken dishwasher. (*Id.* at 78:4-25.)

Concrete examples support Mr. Drost and Ms. Thomason’s assertions that the POA had joint control, in conjunction with unit owners, over unit interiors. Before First Rate assumed the management of the Sagecrest Apartments, the prior property manager, H & H, replaced all of the filters in the apartments. The POA — rather than individual property owners, reimbursed H & H for this service. (Ex. 2, Kalsbeek Dep. 359:8-22.) As another example, the POA exercised its power to make replacement of ceiling fans either optional or mandatory for owners. (Ex. 9, SPOA2991 POA and FR Pre-Annual Meeting, Oct. 25, 2012, at 94:20-97:15.)

- D. The POA controlled the response to the known threat of CO poisoning at Sagecrest. But it badly botched its response, in fact increasing the danger to the tenants/guests.**
- 1. The POA had joint control over the global issue of replacing water heaters. The POA’s unreasonable delay in taking on but unreasonably carrying out the replacement program contributed to this deadly poisoning.**

Crucially to this case, the “global issues” over which Mr. Kalsbeek and the POA exercised control included CO testing and the replacement of water heaters:

A. . . . We consider those global issues. **Global issues consisted of the CO testing. Global issues consisted of the water heaters.** Global issues consisted of leaks with windows, stairwells, light bulbs. Jon --

Q. (BY MR. CLARK) Who —

A. — **Jon was in control, and we did what he told us to do.**

Q. Who’s responsible for the global issues?

A. The POA through Jon.

(Ex. 6, Drost Dep. at 95:9-19 (emphasis added).)

Mr. Kalsbeek himself confirmed that the water heater issue was a global issue that would be best addressed by the POA, rather than exclusively by individual unit owners. In an August 2011 email to an owner at the Sagecrest complex, Mr. Kalsbeek stated:

[T]o pool resources is very beneficial to all. The WH [water heater] and many other issues like PRY’s, expansion tanks, filters, sewers, pool, and landscape all have been resolved in this manner. The board has been advised of the WH

situation and is reviewing the options based on Express Plumbing, Gas company, Sheila's [sic], and other resources — all played apart in researching this issue.

(Ex. 10, FR1755-56 (emphasis added).) The POA also took it upon itself to select and hire an engineering firm to investigate part of the CO problem, paying Engineering Consultants Incorporated for an analysis of the failing water heaters at Sagecrest; unfortunately, the POA failed to act reasonably to follow through with the ECI recommendations. (Ex. 21, ECI Rep., FR288-289; Ex. 22, Kalsbeek Email to Raff re: ECI Rep., FR5531.) The POA's real world actions — taking it upon itself to pool resources and review options for replacing water heaters, and actively investigating the causes of the problems — belie the POA's current stance that it had no authority or control over such issues. By failing to reasonably follow through with its undertaking to replace water heaters, or to maintain or repair the water heaters reasonably, the POA caused the deadly poisoning here.

2. POA had joint control over global issue of water heater preventative maintenance. The POA's decision not to hire qualified professionals to perform preventative maintenance contributed to this lethal CO incident.

The fact that CO poisoning was a global issue over which the POA exercised control is further illustrated by email exchanges between Mr. Kalsbeek and FRPM employees, addressing how the water heaters should be cleaned. When informed by FRPM employee Lizz Loop that a professional plumber should be cleaning the water heaters, Mr. Kalsbeek objected based on cost concerns, in disregard for tenant safety: "This seems to be a very expensive solution to have a plumber come out and vacuum vents for water heaters. Why not have Chris [a contract maintenance man] learn what needs to be done to do it correctly at a lower cost? Are these only going to be done at turnovers?" (Ex. 11, FR4798-99.) Again, Mr. Kalsbeek and the POA's demonstrated pervasive control over the response to the CO issue at Sagecrest. And, although FRPM employee Tara Gaertner forwarded Mr. Kalsbeek the cost of professionally cleaning the water heaters in April of 2011 and Mr. Kalsbeek stated that he would get back to Ms. Gaertner within the next week (Ex. 12, FR4807), the POA never authorized FRPM to hire qualified professionals to perform preventative cleaning. Mr. Kalsbeek and the POA took on the control and responsibility to repair and maintain the water heaters, but failed to reasonably follow through with these duties. Had the POA properly carried out its voluntary undertaking to oversee preventative maintenance on the water heaters, this tragedy could have been avoided.

3. The POA had joint control over global issue of testing for CO inside units. The POA implementation of bizarre and obviously flawed testing procedures contributed to this deadly poisoning by masking the severity of the threat.

In March of 2012, Mr. Kalsbeek instituted a new set of CO testing procedures at the Sagecrest Apartments. (Ex. 13, SPOA709) These procedures were “Jon’s way” — i.e. “the way Jon wanted to have the testing and the maintenance done.” (Ex. 8, Thomason Dep. 52:24-53:16.) Although Ms. Thomason took notes during the meeting at which Mr. Kalsbeek dictated the procedures, she had “very little” input into their formulation. (Ex. 8, Thomason Dep. 79:23-80:8, 81:22-24.) Similarly Tara Gaertner recalled that Mr. Kalsbeek “came into town when we had that meeting and said, ‘This is what the procedures are going to be.’ He laid them out for us.” (Ex. 14, Gaertner Dep. 302:9-11.) She later elaborated:

A. Jon, I believe, drafted the actual sheet that says “Procedures” at the top. Sheila was just summarizing what Jon had discussed to be the procedures.

Q. So at the top when Jon [Kalsbeek] says, “These procedures were worked out with on-site managers, the maintenance supervisor, and Virginia [Mr. Kalsbeek’s wife] and I,” do you think that he was misstating the — how these procedures were put in place or how they were created?

A. I think he’s making it sound like it wasn’t just him that came up with them.

Q. In the meeting — You were in the meeting when these procedures were talked about and, I guess, from your testimony that he put them together?

A. Yes.

Q. So how did this come about? He brought some documents, and then how were the procedures created?

A. From what I remember, I think he already had something written out as to an idea; a rough draft, if you will, of what these were. Sheila kind of summarized them up here in this e-mail.

(Ex. 14, Gaertner Dep. 380:23-381:21.)

Ms. Gaertner objected to the new procedures on the grounds that they did not comport with the procedures provided by Intermountain Gas Company. Contemporaneous proof that she vociferously disagreed with Mr. Kalsbeek’s improper procedures is found in a draft email that Ms. Gaertner wrote.⁴ (Ex. 15, FR245.) Mr. Kalsbeek dismissed Intermountain’s procedures as overly cautious — even stating that Intermountain was trying to instill “the fear of God” in them regarding the threat of CO poisoning. (Ex. 14, Gaertner Dep. 74:17-76:3.)

⁴ Gaertner voiced the same concerns directly to Kalsbeek on the phone. (Ex. 16, FR253-54.)

Mr. Kalsbeek flexed the POA muscle and control over FRPM, directing Ms. Gaertner to follow his procedures, rather than the gas company's procedures:

Q. Somebody is telling you, "Don't use the CO testing procedures from Intermountain Gas." Is that correct?

A. Yes.

Q. And who told you not to use those procedures?

A. Jon [Kalsbeek].

(Ex. 14, Gaertner Dep. 95:3-10.) Ms. Gaertner expressed to Kalsbeek her distress at being forced to use CO testing procedures that she knew did not ensure tenant and guest safety:

I am not going to go rounds on this with you. I was here with a safety manager from Intermountain Gas and Ben with Express Plumbing when they trained me on what to do. I am to be testing in the flu and going off of that number and chart. Anything tested over 50 Intermountain Gas would red tag the water heater, shut it off and not turn it back on until it was either A) cleaned or B) replaced.

(Ex. 17, FR737-38 (emphasis added).)

Bizarrely, these new procedures called for testing without the windows being closed or the only CO-producing device in the apartment — the water heater — being turned on. (Ex. 14, Gaertner Dep. 432:9-433:17.) Moreover, according to Kalsbeek's procedures, an initial test would be performed on the kitchen counter; no further action would be required if the test was below 30 ppm CO. (Ex. 13, SPOA709.) As Robert Peterson, the Manager of Safety at Intermountain, testified, testing should be done throughout the living space, at all heights in each room. (Ex. 18, Peterson Dep. 81:21-82:14.) A result of 30 ppm CO in the living space of a structure indicates that the CO-producing device should be red-tagged — not just that further testing is necessary. (*Id.* at 79:11-16, 83:13-84:8, 93:10-15.) This is because "30 parts per million, even over time, is dangerous." (*Id.* at 84:4-5.) Indeed, *any* reading showing that there is CO in the living space necessitates testing the CO-producing appliance, and red-tagging it if it is identified as the cause. (*Id.* at 88:20-21.) Shockingly, Kalsbeek's procedures did not provide that Intermountain Gas should be contacted unless a water heater tested at 300 ppm CO or higher at the flue *and* the owner affirmatively refused to replace the water heater. (Ex. 13, SPOA709.)

The obvious motive for instituting the badly flawed procedures was that they were guaranteed to *never* result in elevated CO readings, and therefore they would never prompt owners to spend money to replace water heaters. Presumably Mr. Kalsbeek believed that he and the Board would benefit from keeping owner costs down. In an email to FRPM employee Lizz

Loop, Mr. Kalsbeek vented his anger at being inconvenienced by having to visit Boise to *institute* his ridiculous testing procedures:

[W]e traveled 1600 miles (800 each way) to correct the CO monitoring procedure that was being done incorrectly. Over the previous 6 months, how many water heater changes and unnecessary expense to owners was caused by water heaters being changed due to inaccurate readings, — will we ever know?”

(Ex. 19, FR2869-71 at FR2870 (emphasis added).) Predictably, the flawed testing procedures had the desired result: they achieved a perfect record of “zero” CO readings after they were implemented. (Ex. 14, Gaertner Dep. 283:3-284:21; Ex. 2 to the Declaration of Eric R. Clark in Opposition to Defendant Switzer’s Motion for Summary Judgment, FR5818-22.) By rendering the CO tests completely impotent, Mr. Kalsbeek did, temporarily, cut owner costs. In doing so, he and the POA also contributed to the deadly poisoning that occurred a few months later. The POA’s negligent and pervasive acts of control over the CO issue at Sagecrest compel the Court to deny summary judgment.

4. Installing hard-wired CO detectors was a global issue over which the POA had joint control. The POA’s unreasonable delay in carrying out a program of detector installation contributed to this deadly poisoning.

In Mr. Kalsbeek’s March 2012 procedures, installation of hard-wired combination smoke/CO detectors was not scheduled to take place over any specific timeframe; rather, CO detectors would be installed on a piecemeal basis during events such as turnovers and failure of an existing smoke detector. (Ex. 13, SPOA709.) Notably, prior to this litigation Mr. Kalsbeek asserted the POA’s power and control over a decision to install hardwired CO detectors in all Sagecrest units, stating that “**There is absolutely nothing about owners’ approval**” with regard to hard-wired detector installation. (Ex. 9, Meeting Transcript, produced as SPOA2991, at 14:15-18 (interjection of another speaker omitted) (emphasis added).) That telling comment renders the POA’s current stance — that it lacked any such control — completely untenable.

On October 10, 2012, the Meridian Fire Department responded to a carbon monoxide emergency involving Sagecrest tenant Molly Collins. The Fire Department warned First Rate that the carbon monoxide detectors at Sagecrest were inadequate. The next day, First Rate employee Tara Gaertner emailed Mr. Kalsbeek, pleading: “After yesterdays [*sic*] events I would like to have Chris [handyman contractor] go into every unit and check and make sure the CO detectors that we installed are in working condition. The units that do not have CO detectors I

would like him to install one. . . I would really like to do this to take the heat off us.” Mr. Kalsbeek again exhibited the POA’s control over the situation, responding: “*I will talk to the board and see how the board wants to proceed.*” (Ex. 20, SPOA 2658)(emphasis added).

Mr. Kalsbeek then met with Mr. Drost and FRPM employees Lizz Loop and Tara Gaertner in late October 2012. Tara Gaertner again voiced concern that hard-wired carbon monoxide detectors needed to be installed in all Sagecrest Units — up until that date, FRPM had only installed hardwired detectors in only 64 of the 192 units at Sagecrest (FRPM had begun to install the hard-wired detectors, via their contractor Chris Clark, in response to the “new” Carbon Monoxide Procedures as of March 2012). (Ex. 9, Meeting Transcript, produced as SPOA2991, at 11:14-14:24.) Although Mr. Kalsbeek claimed to be “shocked” by this fact,⁵ neither he nor any other member of the POA took steps to immediately remedy the situation. (Ex. 2, Kalsbeek Dep. 332:20-336:16.) On the contrary, Mr. Drost and Mr. Kalsbeek discussed and considered the issue, but agreed that no special steps needed to be taken to act in late October or early November 2012 to ensure that CO detectors were hard-wired in each unit. (Ex. 9, Meeting Transcript, produced as SPOA2991, at 14:25-17:16.)

At the time of the October 25th meeting, it was not too late to take action that could have saved McQuen Forbush from death and Breanna Halowell from serious injuries. On November 12, 2012 — two days after the deadly poisoning — the POA installed hard-wired CO detectors in every unit that did not previously have one (over 100 units). (Ex. 2, Kalsbeek Dep. 278:5-15.) It did so over the course of a single day. (*Id.*) Of course, the POA could have done this at any time before Forbush died and Halowell was injured — but failed to do so. (*Id.* at 278:16-18.)

5. The POA filtered/limited the information regarding the threat of deadly CO poisoning that was provided to unit owners, tenants, and guests.

In addition to manufacturing inaccurate data that concealed the danger of CO poisoning through an obviously flawed testing method, the POA also restricted the flow of available information. As Tara Gaertner testified:

⁵ Kalsbeek’s claim that he was “shocked” by the fact that not all units had hard-wired CO detectors is preposterous. He owned three buildings, and knew that many of his own units did not have hard-wired detectors because he would have been billed for such installations. (Ex. 2, Kalsbeek Dep. 332:20-336:16.)

Q. Did Mr. Kalsbeek ever tell you not to notify the tenants of carbon monoxide issues?

A. Did he ever tell me not to alert the tenants? I know that he had told me not to give out — it was a piece of paper from the instruction manual in the carbon monoxide detectors that we were handing out with this letter, and it stated different levels of CO levels and what the — what's the word I'm looking for — symptoms were experienced at those levels.

Q. Okay.

A. I know he specifically not — told me not to hand that out to the owners or the tenants.

(Ex. 14, Gaertner Dep. 241:22-242:11.) Similarly, Sheila Thomason, First Rate's Maintenance Director, testified that she wanted to provide letter written by Ben Davis, a plumber, to all of the owners. However, Kalsbeek ordered her not to do so:

THE WITNESS: I wanted to send the information [the Ben Davis letter] to every single owner at Sagecrest.

Q. (BY MR. PALMER) Did you tell Jon that, Jon Kalsbeek?

A. Yes, I did.

* * * *

Q. What was Jon's response when you said that you wanted to send [the letter] to every single owner?

A. He said, "Absolutely not."

Q. Did he say why? Did you ask him why?

A. He wanted to be the one in charge of distributing this type of information to the individual — individual owners at Sagecrest.

(Ex. 8, Thomason Dep. 140:16-141:11; *id.* at 193:25-195:14 (Kalsbeek was the only barrier preventing Ms. Thomason from distributing Mr. Davis' letter to all owners).)

In October of 2012, after tenant Molly Collins was poisoned, Mr. Kalsbeek expressed anger at Drost because his employee had advised the tenant to seek testing by professionals.

He was upset that she [Ms. Gaertner] would instruct a tenant to call the fire department or Intermountain Gas. He said that she was continually not following his procedures as revised, that she should have gone over there and tested it, and that it created a liability for myself and the POA by calling the authorities or public entity or something like that.

(Ex. 6, Drost Dep. 257:9-16.) This further illustrates the POA's control over the information provided to individuals at risk of being killed by CO poisoning. The POA assumed control over the warnings that would be provided, but then unreasonably and recklessly withheld information and failed to reasonably follow through with its undertaken duty to warn.

III. STANDARD OF REVIEW

A. Summary judgment is improper unless the movant demonstrates that it is entitled to judgment as a matter of law and no genuine issues of material fact remain for jury.

Summary judgment is improper unless there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56. Thus, a court should not grant summary judgment when “the evidence is conflicting on material issues, or if reasonable minds could reach different conclusions.” *Liberty Nw. Ins. Co. v. Spudnik Equip. Co., LLC*, 155 Idaho 730, 316 P.3d 646, 649 (2013) (quoting *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998)).

“On a motion for summary judgment, the ‘burden of proving the absence of a material fact rests at all times upon the moving party.’ ” *Silicon Int’l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 314 P.3d 593, 605 (2013) (quoting *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994)). A court must “construe the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences in that party’s favor.” *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 104, 294 P.3d 1111, 1116 (2013) (quoting *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005)).

Summary judgment is rarely proper in negligence cases. *See Christensen v. Georgia-Pac. Corp.*, 279 F.3d 807, 813 (9th Cir. 2002) (“Summary judgment is rarely granted in negligence cases because the issue of whether the defendant acted reasonably is ordinarily a question for the trier of fact.” (quotation marks and footnote omitted)).

B. Existence of a duty is a question of fact when it depends on the resolution of a factual dispute.

Although the existence of a duty is normally a question of law, it becomes a question of fact when it depends on the resolution of a factual dispute. *See Stoddart v. Pocatello Sch. Dist. # 25*, 149 Idaho 679, 686, 239 P.3d 784, 791 (2010) (“Normally, the foreseeability of a risk of harm, and thus whether a duty consequently attaches, is a question of fact reserved for the jury.”); *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 402, 987 P.2d 300, 314 (1999) (questions of fact regarding whether defendant assumed a duty through a voluntary undertaking precluded summary judgment).

C. If a contract is ambiguous, the parties' course of dealings is key evidence of intent.

The primary objective in interpreting a contract is to determine the parties' intent. *Guzman v. Piercy*, 155 Idaho 928, 936, 318 P.3d 918, 926 (2014). Whether a contract is ambiguous, and the interpretation of unambiguous contracts, are questions of law for the court to decide; however, the interpretation of an ambiguous contract is a question of fact for the jury to decide. *See Knipe Land Co. v. Robertson*, 151 Idaho 449, 455, 259 P.3d 595, 601 (2011). "In determining patent ambiguity, the contract as a whole is considered. A contract phrase is patently ambiguous when there are two different reasonable interpretations or the language is nonsensical." *Buku Properties, LLC v. Clark*, 153 Idaho 828, 832, 291 P.3d 1027, 1031 (2012) (citations and quotation marks omitted). When a contract is ambiguous, extrinsic evidence is admissible determine the parties' intent. *Id.* at 834, 291 P.3d at 1033 (2012). "A course of dealing is a pattern of conduct between the parties that may be used as evidence of how the parties intended the contract to be interpreted; it is evidence of the construction the parties placed on the language of the contract." *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, No. 40566, 2014 WL 3766387, at *10 (Idaho Aug. 1, 2014); *see also City of Meridian v. Petra Inc.*, 154 Idaho 425, 439, 299 P.3d 232, 246 (2013).

D. The extent of an agent's authority is a question of fact.

The extent of an agent's authority is a question of fact that is normally reserved for the jury. *See Clark v. Tarr*, 76 Idaho 383, 391, 283 P.2d 942, 947 (1955) ("[T]he nature and extent of the authority of an agent and whether the act or contract in controversy was within the scope of his authority are, under the evidence, questions of fact to be determined by the jury or other trier of facts"); *Muniz v. Schrader*, 115 Idaho 497, 500-01, 767 P.2d 1272, 1275-76 (Ct. App. 1989) ("[I]n a case where the evidence is conflicting, or different reasonable interpretations may be drawn from the evidence, the question of the nature and extent of the authority of an agent is one of fact to be determined by the trier of fact."); *see also 3 C.J.S. Agency* § 609.

IV. ARGUMENT

A. The POA owed a general duty to exercise reasonable care under the circumstances as well as a duty to use reasonable care when performing its voluntary undertaking to address the threat of CO poisoning at the Sagecrest Apartments.

The POA erroneously suggests that premises liability is the exclusive theory under which Plaintiffs may recover. (Def's Memo. at 5.) Next, the POA contends that it does not owe any

premises liability duty because it did not have control over the unit interiors — rather, it supposedly had control only of the adjacent unit exteriors and common areas. (*Id.* at 6.) Both assertions are false. Idaho law is clear that, even if a defendant owes no duty under premises liability principles, the defendant may still owe (1) a general duty to exercise reasonable care under the circumstances, or (2) a duty to perform any voluntary undertaking with reasonable care. Separately, genuine issues of material fact preclude summary judgment on the issue of whether the POA had control over unit interiors, and thus whether it owed a duty under premises liability principles.

1. Regardless of the existence of a premises liability duty, the POA owed a general duty to exercise reasonable care.

“Every person has a general duty to use due or ordinary care not to injure others, to avoid injury to others by any agency set in operation by him, and to do his work, render services or use his property as to avoid such injury.” *Grabicki v. City of Lewiston*, 154 Idaho 686, 691, 302 P.3d 26, 31 (2013)(quoting *Brian & Christie, Inc. v. Leishman Elec., Inc.*, 150 Idaho 22, 29, 244 P.3d 166, 173 (2010)). A duty may arise *either* from the general duty to use reasonable care *or* from the control of property.

The very authority that the POA relies on for the proposition that this case should be “examined under Idaho’s premises liability law” — *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 179 P.3d 352 (Ct. App. 2008) (cited in Def’s Memo. at 5) — actually undermines that assertion. In *Boots*, trespassers sued a landlord after the tenant’s dog attacked them. The court first analyzed whether there was a duty under premises liability principles. *Id.* at 393, 179 P.3d at 356. Then, separately, the court analyzed the “general duty to exercise ordinary care.” *Id.* at 393-94, 179 P.3d at 356-57. Nothing in *Boots* suggests that just because a case can be analyzed under premises liability principles, this is the exclusive mode of analysis. On the contrary, the *Boots* court observed: “Our Supreme Court has suggested that premises liability is not the exclusive source of duties where a landowner is involved. Instead, circumstances may give rise to a general duty of care owed to third parties.” *Id.* at 393, 179 P.3d at 356 (citing *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999)).

Here, the POA knew about a significant danger of CO poisoning for over sixteen months. It had control over unit interiors, both directly and through its agent, FRPM. It took repeated and widespread action in response to the deadly danger. Nonetheless, it failed to exercise *reasonable*

care, either directly or through its agent FRPM, to avert a highly foreseeable tragedy. Thus, this Court should deny the POA's Motion for Summary Judgment.

2. Even if no duty arises under premises liability principles, a duty may nonetheless arise as a result of a voluntary undertaking.

A voluntary undertaking may impose a duty under clear Idaho law:

"Even when an affirmative duty generally is not present, a legal duty may arise if one voluntarily undertakes to perform an act, having no prior duty to do so." *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 350, 179 P.3d 309, 313 (2008) (internal quotation omitted). In such a case, the acting party has a duty to perform that act in a non-negligent manner. *Udy v. Custer Cnty.*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001). "When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed." *Martin v. Twin Falls School Dist. No. 411*, 138 Idaho 146, 150, 59 P.3d 317, 321 (2002).

Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints, 155 Idaho 680, 688, 316 P.3d 92, 100 (2013). Assumed duties can arise both from safety-related undertakings and from other undertakings. *Id.* at 688 n.5, 316 P.3d at 100 n.5.

A duty arising from one's status as a landowner and a duty arising from a voluntary undertaking are "alternative" theories. See *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 987 P.2d 300, 312 (1999); see also *Raburn v. Wal-Mart Stores, Inc.*, 776 So. 2d 137, 139 (Ala. Civ. App. 1999) (although store owed no duty in its capacity as a premises owner, store voluntarily assumed duty to protect customer from fleeing shoplifter). In *Coghlan*, an eighteen-year-old university student joined a sorority. *Id.* at 392-93, 987 P.2d at 304-05. Shortly thereafter, she attended a fraternity party. Two university employees who were present at the party knew, or should have known, that the fraternity was illegally serving her alcohol, but apparently did nothing to prevent this or otherwise aid the student. *Id.* at 400, 987 P.2d at 312. Later that evening, the student returned to her sorority house, fell off a fire escape, and was injured. The student sued the university under both a landowner liability theory and an assumed undertaking theory. Although the district court dismissed her claims on the grounds that the university owed her no duty, but the Idaho Supreme Court reversed, holding that *a duty could have arisen from the university's voluntary undertaking to monitor underage drinking*. See *id.* The court further noted: "Because of our holding, we do not find it necessary to discuss [Student's] alternative theory of landowner liability for the University." *Id.* The fact that a claim

may be categorized as premises liability does not preclude other sources of duties, such as voluntary undertakings.

Here, the POA engaged in an extensive, multi-faceted undertaking to address the threat of CO poisoning at the Sagecrest Apartment Complex. The POA promised to investigate options to pool resources for replacing the defective water heaters. The POA promised to respond to a request by FRPM to hire a qualified professional to perform preventative maintenance on the defective water heaters. The POA hired a professional engineering firm to assess and provide suggestions for how to deal with the failing water heaters (albeit on a limited budget and scope of work). The POA undertook a program to test for CO, but unfortunately directed FRPM to follow bizarre procedures that were guaranteed to result in invariable “zero” readings, thereby masking the problem. The POA undertook to control the response including replacement and repair/maintenance of water heaters, installation of (some) carbon monoxide detectors, and (sometimes) warning tenants and owners of the threat of CO at the property; but the POA unreasonably failed to deal with the water heaters or the CO detectors, and it unreasonably filtered what information, if any, regarding the threat of deadly CO poisoning was actually passed along to unit owners, tenants, and guests. The POA undertook a program for installing hard-wired CO detectors, although most were installed only after this tragedy. In short, there is ample evidence from which a jury could conclude that the POA negligently performed a voluntary undertaking to avert the risk of CO poisoning at Sagecrest.

3. Even if premises liability were the only theory of recovery, a genuine issue of material fact remains regarding the POA’s control over the unit interiors.

“[T]he general rule of premises liability is that *one having control of the premises may be liable for failure to keep the premises in repair.*” *Jones v. Starnes*, 150 Idaho 257, 261, 245 P.3d 1009, 1013 (2011) (emphasis added) (alteration in original) (quoting *Heath v. Honker’s Mini-Mart, Inc.*, 134 Idaho 711, 713, 8 P.3d 1254, 1256 (Ct. App. 2000)); *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 393, 179 P.3d 352, 356 (Ct. App. 2008) (reciting identical quote from *Heath*). The POA apparently agrees with this proposition, but asserts that it lacked control over unit interiors so it cannot be held liable by premises liability principles. (Def’s Memo. at 5-6.)

Defendants attempt to analogize this case to *Heath*, 134 Idaho 711, 8 P.3d 1254. (Def’s Memo. at 6.) In *Heath*, a pedestrian slipped on ice while walking across a vacant lot. She sued an adjacent convenience store alleging that it “occupied” the lot because the store’s customers

used the lot for ingress and egress. *Id.* at 714, 8 P.3d at 1257. The Idaho Court of Appeals disagreed, holding that the store owed no duty to the pedestrian because it “neither owned, occupied, **nor controlled** the premises.” *Id.* at 715, 8 P.3d at 1258 (emphasis added). It is clear that “control” is a separate source of a duty under premises liability law.

Nor is *McDevitt v. Sportsman’s Warehouse, Inc.*, 151 Idaho 280, 255 P.3d 1166 (2011)⁶ (cited in Def’s Memo. at 6) of any assistance to the POA’s argument. Although the *McDevitt* court analyzed the relevant CCR’s to determine the issue of control, there was no suggestion that the defendant in that case had any authority to repair, maintain, or restore the instrumentality that caused the injury in that case (a recessed irrigation box). Nor was there any evidence that the defendant, there, *actually* exercised such control.

Here, in contrast to the facts of *Heath* and *McDevitt*, the POA retained the authority to repair, maintain, and restore unit interiors when it deemed the owner’s activities to be unsatisfactory. Through its contract, it imposed a duty on FRPM to ensure the safety of the occupants of the apartments, and also required that FRPM confer with the POA regarding any significant repairs. And, there is a large amount of evidence from which a jury could conclude that the POA *actually* exercised such control, regardless of whether it had contractual authority to do so or not. Therefore, this Court should deny the POA’s Motion for Summary Judgment.

B. Whether FRPM failed to exercise reasonable care – while acting as the POA’s agent (creating vicarious liability for the POA) – is a genuine issue of material fact

Because the scope of FRPM’s agency to the POA included its activities in unit interiors, the POA can be held vicariously liable for FRPM’s negligence.⁷ See *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 303, 796 P.2d 506, 512 (1990) (“A principal is liable for the torts of an agent committed within the scope of the agency relationship.”).

⁶ *McDevitt* dealt with the duties owed by a lessee of adjacent land to a business invitee. It is not on point here. However, *McDevitt* discussed the *Heath* case with approval, noting that *Heath* dealt with the duties owed by an owner of adjacent land to a trespasser. As explained above, and further confirmed in *McDevitt*’s analysis of *Heath*, a duty arises if an owner of adjacent land exercises control over the premises upon which the injury occurred. See *McDevitt*, 151 Idaho at 286, 255 P.3d at 1172.

⁷ The POA makes no effort to argue that FRPM was not negligent.

1. The POA-FRPM Contract provides that the POA may exercise control over FRPM's performance with respect to unit interiors.

In an effort to escape the fact that it *actually* exercised significant control over FRPM's activities related to unit interiors, the POA relies heavily on Section 2.1 of the POA-FRPM Contract: "Appointment: ASSOCIATION hereby appoints AGENT as the exclusive Managing Agent of the ASSOCIATION with respect to the property commonly known as Sagecrest POA." (Ex. 3 to the Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment, POA-FRPM Contract, at FR6279 § 2.1 (emphasis removed) (quoted in Def's Memo. at 10).) Section 2.1 is a *grant* of authority, not a *limitation* on the scope of FRPM's authority. Nothing in Section 2.1 precludes additional grants of authority — such as that in Section 3.4 of the same document. Additionally, the phrase "the Property" unambiguously refers to the *entire* Sagecrest Apartment Complex, not only unit exteriors and common areas. This meaning is demonstrated by Section 3.4 of the POA-FRPM Contract, which provides that one of FRPM's duties is to:

Take such action as AGENT deems reasonable and appropriate in the event of **any emergency** brought to AGENT's attention which may result in damage to the Property or cause injury to **tenants and occupants of the Property**. Notwithstanding this authority, it is understood and agreed that AGENT will if at all possible, confer immediately with the President or other authorized officer of the ASSOCIATION regarding all emergency repairs in excess of \$300.00 without first obtaining approval of the ASSOCIATION.

(Ex. 3 to the Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment, POA-FRPM Contract, at FR6280 § 3.4 (emphasis added).) If the word "Property" meant "unit exteriors and common areas," then this would produce an irrational reference to "tenants and occupants of unit exteriors and common areas." The unit exteriors and common areas have neither tenants nor occupants. Therefore, the word "Property" must embrace unit interiors as well. Moreover, Section 3.4 requires FRPM to address "any emergency" — without regard for whether that emergency arises in a unit interior, unit exterior, or common area. A plain reading of the contract demonstrates that "the Property" is the entire Sagecrest Apartment Complex. The POA and their agent controlled the entire Sagecrest property.

Assuming *arguendo* that this Court is unable to conclude that the contract is unambiguous and that "the Property" refers to the entire Sagecrest Apartment Complex, that phrase is at least ambiguous, requiring the jury to determine its meaning. The POA claims,

without any supporting citation, that definition “the property commonly known as the Sagecrest POA” actually means only “the areas of the Sagecrest complex that the POA had authority and duty to maintain in the CCR’s.” (Def’s Memo. at 10.) On the contrary, the phrase “the Property” is *not* defined by reference to the CCR’s anywhere in the POA-FRPM Contract. To the extent “the Property” is defined as that which is “commonly known as the Sagecrest POA,” this definition is nonsensical and therefore suffers from patent ambiguity. There is no evidence that any property was commonly known by that term, rather “the Sagecrest POA” is a corporation that lacks and physical form, not a parcel of land.

Finally, even to the extent that the scope of FRPM’s agency for the POA is limited to the scope of FRPM’s authority specified in the CCR’s, that still would not be dispositive: the CCR’s give the owners and POA joint control over the repair, maintenance, and restoration of unit interiors. (See Ex. 2 to the Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners’ Association, Inc.’s Motion for Summary Judgment, CCR’s, at SPOA2926 § 3.8.) And, the CCR’s define “Property” as *all* of the land upon which the Sagecrest Apartment Complex sits, without any differentiation between unit interiors and exteriors. (See Ex. 2 to the Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners’ Association, Inc.’s Motion for Summary Judgment, CCR’s, at SPOA2923, 2951.) To the extent that the CCR’s and POA-FRPM contract should be read together, this further confirms that the FRPM acted on the POA’s behalf as agent with respect to controlling and managing the unit interiors.

2. Switzer-FRPM Contract does *not* limit the POA’s authority over unit interiors; owners and the POA exercise joint control over unit interiors.

The POA also relies on the contract between the unit owner (Matthew E. Switzer, Trust) and FRPM in an effort to establish that the POA lacked control over unit interiors. (Def’s Memo. at 10.) The fact that FRPM acted as an agent for owners at Sagecrest with respect to unit interiors does not preclude it from also acting as the POA’s agent with respect to the same subject matter. It is well established that a single agent may serve multiple principals, even with respect to a single transaction. See *C&R Forestry, Inc. v. Consol. Human Res., AZ, Inc.*, No. 05-cv-381, 2007 WL 914198, at*4 (D. Idaho Mar. 23, 2007) (allegations and evidence that agent served defendant X did not foreclose possibility that agent also served defendant Y, because “a person may be the agent of multiple principals”); see also *1-800 Contacts, Inc. v. Lens.com, Inc.*,

722 F.3d 1229, 1250 (10th Cir. 2013) (“An agent can serve multiple principals at once”); Restatement (Second) of Agency § 226 (1958) (“A person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other.”) (cited with approval by the Idaho Federal District Court in *C&R Forestry*, *supra*); Restatement (Third) Of Agency § 3.16 (2006) (“Two or more persons may as coprincipals appoint an agent to act for them in the same transaction or matter.”); *see also* Restatement (Third) Of Agency § 7.03 cmt. d (2006) (“An agent who commits a tort may have more than one principal for at least some purposes.”). FRPM served as an agent for both the SPOA and Switzer with respect to the apartment interior.

3. Regardless of contract interpretation, the POA’s *actual* exercise of control creates a genuine issue of material fact regarding the scope of the agency.

The nature of a principal-agent relationship depends on the *actual* relationship between the parties, not merely how they characterize that relationship in a contract. *See In re M/V Rickmers Genoa Litig.*, 622 F. Supp. 2d 56, 74 (S.D.N.Y. 2009)(emphasis added) (“[B]ecause agency is determined according to extant factual circumstances, a contractual disclaimer or acknowledgement of agency is not dispositive for purposes of determining whether an agency relationship exists as a matter of law.”); *Tomlinson v. G.E. Capital Dealer Distrib. Fin., Inc.*, 624 So. 2d 565, 567 (Ala. 1993); *Hylton v. Koontz*, 636, 532 S.E.2d 252, 257 (N.C. Ct. App. 2000) (“It is not dispositive that a contract denies the existence of an agency relationship, if in fact the relationship was that of agent-principal.”); *see also Adkison Corp. v. Am. Bldg. Co.*, 107 Idaho 406, 409, 690 P.2d 341, 344 (1984) (“agency may be proven by circumstances and course of dealing between the parties” and “agency may be established from the relationship of the parties to each other and to the subject matter.”).

Here, the POA’s legal arguments crumble with even a passing glance at the facts and evidence that reveal the degree of authority and control it in fact exercised at the Sagecrest property. As shown throughout the Facts section, above, prior to this litigation the POA vigorously asserted its power to direct FRPM’s performance with respect to all “global issues” affecting unit interiors, including water heater replacement, water heater preventative maintenance, hard-wired CO detector installation, CO testing, and the dissemination of information regarding CO poisoning. Now, in an attempt to evade liability, the POA denies the very control that it previously exercised. To the extent that the POA lacked any *formal* authority

over unit interiors — which is not established, and is in fact contradicted by the plain language of the relevant documents — FRPM *actually* served as the POA’s agent with respect to unit interiors. Summary judgment is improper in light of such strong evidence that the POA exercised control, both independently and through its agent FRPM, in responding (albeit unreasonably) to the known lethal threat of CO at the Sagecrest Apartments.

V. CONCLUSION

The POA’s Motion primarily focuses on the issue of control over unit interiors, forwarding a specious argument that it could not, or did not, control the Sagecrest apartments or the danger of CO that ultimately poisoned Forbush and Halowell. A deluge of evidence to the contrary controverts the POA’s argument — evidence from which a reasonable jury could conclude that the POA did, in fact, have such authority, and carried out such authority in an unreasonable and dangerous fashion. This evidence includes the CCR’s; the POA-FRPM Contract; the testimony of FRPM employees that the POA exercised control over “global issues” including those regarding unit interiors; the POA’s control over interior ceiling fans; the POA’s actual exercise of control over water heater maintenance; the POA’s actual exercise of control over CO testing; and the POA’s actual exercise of control over the installation of hard-wired CO detectors. Given this extensive evidence, this Court should allow the jury to consider the question of the POA’s control over unit interiors. Moreover, a genuine issue of material fact remains regarding whether the POA negligently performed its voluntary undertaking with respect to all of these activities. Therefore, this Court should deny the POA’s Motion for Summary Judgment.

DATED this 22nd day of August, 2014.



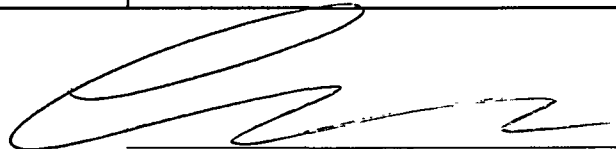
ERIC R. CLARK (ISB # 4697)
CLARK & ASSOCIATES

G. BRYAN ULMER, ulmer@spencelawyers.com
TYSON E. LOGAN, logan@spencelawyers.com
MICHAEL F. LUTZ (ISB # 9218)
THE SPENCE LAW FIRM, LLC
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2014, I caused a true and correct copy of the foregoing to be served via email, addressed to the following:

James D. LaRue jdl@elamburke.com Matthew Walters mlw@elamburke.com ELAM & BURKE, PA <i>For A.O. Smith</i>	Mark Tripp tripp.mark@bradshawlaw.com Jason C. Palmer palmer.jason@bradshawlaw.com BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C. <i>For A.O. Smith</i>
Michael Elia mje@mbelaw.net Craig Stacey Craig@mbelaw.net MOORE & ELIA, LLP <i>For Sagecrest POA</i>	John M. Howell jhowell@brassey.net BRASSEY, CRAWFORD & HOWELL, PLLC <i>For Kalsbeek, Arla, Schwab, and Meisner</i>
Michael Haman mlhaman.law@gmail.com HAMAN LAW OFFICE <i>For Mathew E. Switzer and the Mathew E. Switzer Trust</i>	William A. Fuhrman BFuhrman@idalaw.com Christopher Graham CGraham@idalaw.com JONES GLEDHILL FUHRMAN GOURLEY, P.A. <i>For Anfinson Plumbing</i>
Robert Anderson raanderson@ajhlaw.com Robert A. Mills rmills@ajhlaw.com ANDERSON, JULIAN & HULL LLP <i>For First Rate Property Management & Drost</i>	



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PO Box 2504
Eagle, ID 83616
208-830-8084 / 208-939-7136 fax

NO. _____
A.M. _____ P.M. *et*

AUG 22 2014

CHRISTOPHER D. RICH, Clerk
By **PATRICK McLAUGHLIN**
DEPUTY

G. BRYAN ULMER, ulmer@spencelawyers.com
TYSON E. LOGAN, logan@spencelawyers.com
MICHAEL F. LUTZ (ISB # 9218), mlutz@spencelawyers.com
THE SPENCE LAW FIRM, LLC
PO Box 548, 15 S. Jackson St.
Jackson, WY 83001
307-733-7290 / 307-733-5248 fax

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

<p>TRAVIS FORBUSH and GRETCHEN HYMAS, individually and as the natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased), and BREANNA HALOWELL,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION <i>et al.</i>,</p> <p>Defendants.</p>	<p>Case No. CV PI 1304325</p> <p>DECLARATION OF ERIC R. CLARK IN OPPOSITION TO DEFENDANT SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION MOTION FOR SUMMARY JUDGMENT</p>
---	---

Eric R. Clark declares and states as follows:

DECLARATION OF ERIC R. CLARK IN OPPOSITION TO DEFENDANT SAGECREST MULTI-
FAMILY PROPERTY OWNERS' ASSOCIATION MOTION FOR SUMMARY JUDGMENT — 1

000361

1. I am over 18 years of age and am competent to make this affidavit.
2. I am an attorney of record for the Plaintiffs in the above-captioned case.
3. Attached hereto as Exhibit 1 are true and correct copies of documents produced in discovery, bates stamped as FR 1416-1422.
4. Attached hereto as Exhibit 2 are true and correct copies of the relevant portions of the deposition of Jon Kalsbeek.
5. Attached hereto as Exhibit 3 is a true and correct copy of a document produced in discovery, bates stamped as FR444.
6. Attached hereto as Exhibit 4 are true and correct copies of documents produced in discovery, bates stamped as FR 1672-1673.
7. Attached hereto as Exhibit 5 is a true and correct copy of a document produced in discovery, bates stamped as FR5862.
8. Attached hereto as Exhibit 6 are true and correct copies of the relevant portions of the deposition of Tony Drost.
9. Attached hereto as Exhibit 7 are true and correct copies of documents produced in discovery, bates stamped as FR 302-303.
10. Attached hereto as Exhibit 8 are true and correct copies of the relevant portions of the deposition of Shelia Thomason.
11. Attached hereto as Exhibit 9 is a true and correct copy of a transcript of an audio recording produced in discovery of a meeting on October 25, 2012, bates stamped SPOA 2991.
12. Attached hereto as Exhibit 10 are true and correct copies of documents produced in discovery, bates stamped as FR 1755-1756.
13. Attached hereto as Exhibit 11 are true and correct copies of documents produced in discovery, bates stamped as FR 4798-4799.
14. Attached hereto as Exhibit 12 is a true and correct copy of a document produced in discovery, bates stamped as FR4807.
15. Attached hereto as Exhibit 13 is a true and correct copy of a document produced in discovery, bates stamped as SPOA 709.
16. Attached hereto as Exhibit 14 are true and correct copies of the relevant portions of the deposition of Tara Gaertner.

17. Attached hereto as Exhibit 15 is a true and correct copy of a document produced in discovery, bates stamped as FR 245.

18. Attached hereto as Exhibit 16 are true and correct copies of documents produced in discovery, bates stamped as FR 253-254.

19. Attached hereto as Exhibit 17 are true and correct copies of documents produced in discovery, bates stamped as FR 737-738.

20. Attached hereto as Exhibit 18 are true and correct copies of the relevant portions of the deposition of Robert Peterson.

21. Attached hereto as Exhibit 19 are true and correct copies of documents produced in discovery, bates stamped as FR 2869-2871.

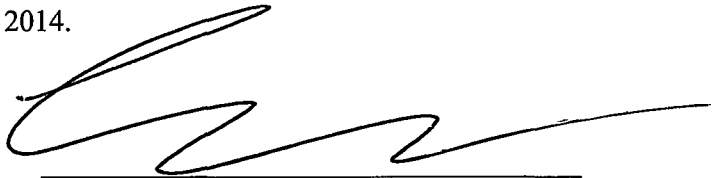
22. Attached hereto as Exhibit 20 is a true and correct copy of a document produced in discovery, bates stamped as SPOA 2658.

23. Attached hereto as Exhibit 21 are true and correct copies of documents produced in discovery, bates stamped as FR 288-299.

24. Attached hereto as Exhibit 22 are true and correct copies of documents produced in discovery, bates stamped as FR 5531-5532.

I declare under penalty of perjury under the laws of the State of Idaho and the laws of the United States, that the foregoing is true and correct.

DATED this 22nd day of August, 2014.

A handwritten signature in black ink, appearing to read 'Eric R. Clark', written over a horizontal line.

Eric R. Clark
CLARK & ASSOCIATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of August, 2014, I caused a true and correct copy of the foregoing to be served via email, addressed to the following:

James D. LaRue jdl@elamburke.com Matthew Walters mlw@elamburke.com ELAM & BURKE, PA <i>For A.O. Smith</i>	Mark Tripp tripp.mark@bradshawlaw.com Jason C. Palmer palmer.jason@bradshawlaw.com BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C. <i>For A.O. Smith</i>
Michael Elia mje@mbelaw.net Craig Stacey Craig@mbelaw.net MOORE & ELIA, LLP <i>For Sagecrest POA</i>	John M. Howell jhowell@brassey.net BRASSEY, CRAWFORD & HOWELL, PLLC <i>For Kalsbeek, Arla, Schwab, and Meisner</i>
Michael Haman mlhaman.law@gmail.com HAMAN LAW OFFICE <i>For Mathew E. Switzer and the Mathew E. Switzer Trust</i>	William A. Fuhrman BFuhrman@idalaw.com Christopher Graham CGraham@idalaw.com <i>For Anfinson Plumbing</i>
Robert Anderson raanderson@ajhlaw.com Robert A. Mills rmills@ajhlaw.com ANDERSON, JULIAN & HULL LLP <i>For First Rate Property Management & Drost</i>	


Eric R. Clark

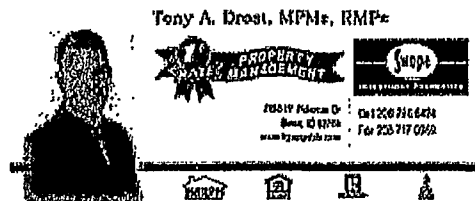
From: Sheila Thomason
Sent: Thursday, July 21, 2011 12:27 PM
To: Tony Drost
Cc: Sagecrest; Lizz Loop
Subject: RE: Red flag

They are the problem. They can just be cleaned but they clog easily since they are in the same enclosure as the dryers. It's like a lint trap for the water heater. Express has been cleaning them and at times breaking a hole in them so if they are clogged it will still be able to vent and not cause the carbon monoxide issues. Just a poor design. We could put them on a cleaning schedule and purchase carbon monoxide detectors but there are lots of issues that will be created from that. The water heaters only have about 3 more years of life anyways. We'll keep you posted with the readings today and we'll go from there. We definitely don't want to kill the owners pockets or any of the tenants (well maybe a couple would be ok). We'll come up with something.

Thanks,
Sheila

From: Tony Drost
Sent: Thursday, July 21, 2011 9:41 AM
To: Sagecrest; Lizz Loop; Marie Swanson; Sheila Thomason
Subject: RE: Red flag

Who knows, but perhaps that part can be replaced for less than replacing the water heater. What if we installed CO detectors? We don't want to do anything that can cause issues, but we need to confirm that this is the cause of the elevated levels before jumping to something that will cost \$20,000.



Tony A. Drost
www.frpmrentals.com
www.boiseinvestmentproperties.net



From: Sagecrest
Sent: Thursday, July 21, 2011 9:37 AM
To: Tony Drost; Lizz Loop; Marie Swanson; Sheila Thomason
Subject: RE: Red flag

The only way to fix the problem is to break the honey cone and Intermountain Gas wont clear the water heaters if they have been "modified." IG says that's not how the manufacturers made

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FR01416

000366

them and the hone cone is meant to not be broken. If someone dies and it's from a water heater that Express has broken the honey cone... then what? Ben's not going to do it anymore.

Tara Gaertner

Sagecrest Apartments

First Rate Property Management

P: (208) 514-4304

F: (208) 884-3487

www.sagecrestapts.com

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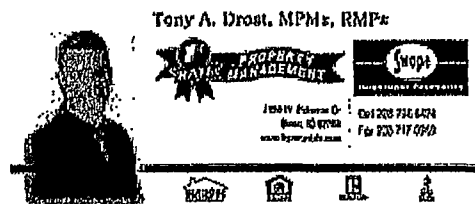
From: Tony Drost

Sent: Thursday, July 21, 2011 9:25 AM

To: Sagecrest; Lizz Loop; Marie Swanson; Sheila Thomason

Subject: RE: Red flag

Please let me know the results of the test. I am having a hard time believing that we have to replace them and there is no acceptable retro available. But, I'll trust the experts.



Tony A. Drost

www.frpmrentals.com

www.boiselinvestmentproperties.net



From: Sagecrest

Sent: Wednesday, July 20, 2011 11:23 AM

To: Tony Drost; Lizz Loop; Marie Swanson; Sheila Thomason

Subject: Red flag

We have a very serious situation going on at Sagecrest. I just had a meeting with the big wigs at Intermountain Gas and Ben and Brad with Express Plumbing. Monday night there was an emergency call regarding gas smell from 1811. Intermountain Gas came out and the reading of the Carbon Monoxide was deadly. If the tenants had been in there for 45 more minutes they would have died. Exact words Intermountain Gas used. They were wanting to know what was being done to fix this problem in the past. Breaking the honey cone and cleaning the vent is what they have done in the past. Intermountain Gas is no longer going to be clearing the water heaters if they have been "modified." Ben is done with the AOSmith water heaters. Express is no longer going to be doing any kind of cleaning or maintenance on these water heaters. We have all

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FR01417

000367

conclusion that the only way to fix this problem without modifying the water heater is to replace them completely.

I talked to Jon about this last night, he said since this is an owner expense that I'll have to send something to the owners and have them decide what they want to do. If they want to replace all together at the same time or do them once a month for example. Talking with Express and Intermountain Gas they both said they firmly do not think this should even be an option to the owner, that all AOSmith water heaters need replaced regardless and they need replaced as soon as possible. If the owners decide they do not want to then they will have to sign a waiver basically stating that if a tenant dies FRPM, Express & Intermountain Gas is not held liable for it.

Intermountain Gas wants to know what is being done NOW to prevent this from happening tomorrow. I am delivering notices to all doors today. Express is going out and buying a Carbon Monoxide tester today and will be out tomorrow testing everyone's water heater to make sure there are no high readings.

My question is: Can we make the replacing of the water heaters mandatory or does it have to be an option to the owners?

Tara Gaertner

Sagecrest Apartments

First Rate Property Management

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F: (208) 884-3487

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FR01418

000368

From: Sagecrest
Sent: Thursday, July 21, 2011 9:37 AM
To: Tony Drost; Lizz Loop; Marie Swanson; Sheila Thomason
Subject: RE: Red flag

The only way to fix the problem is to break the honey cone and Intermountain Gas wont clear the water heaters if they have been "modified." IG says that's not how the manufacturers made them and the hone cone is meant to not be broken. If someone dies and it's from a water heater that Express has broken the honey cone... then what? Ben's not going to do it anymore.

Tara Gaertner

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F: [208] 884-3487

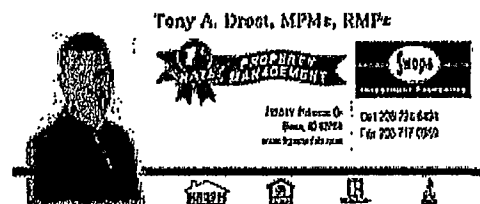
www.sagecrestapts.com

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From: Tony Drost
Sent: Thursday, July 21, 2011 9:25 AM
To: Sagecrest; Lizz Loop; Marie Swanson; Sheila Thomason
Subject: RE: Red flag

Please let me know the results of the test. I am having a hard time believing that we have to replace them and there is no acceptable retro available. But, I'll trust the experts.



Tony A. Drost

www.frpmrentals.com

www.boiseinvestmentproperties.net



From: Sagecrest
Sent: Wednesday, July 20, 2011 11:23 AM
To: Tony Drost; Lizz Loop; Marie Swanson; Sheila Thomason
Subject: Red flag

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FR01419

000369

We have a very serious situation going on at Sagecrest. I just had a meeting with the big wigs at Intermountain Gas and Ben and Brad with Express Plumbing. Monday night there was an emergency call regarding gas smell from 1811. Intermountain Gas came out and the reading of the Carbon Monoxide was deadly. If the tenants had been in there for 45 more minutes they would have died. Exact words Intermountain Gas used. They were wanting to know what was being done to fix this problem in the past. Breaking the honey cone and cleaning the vent is what they have done in the past. Intermountain Gas is no longer going to be clearing the water heaters if they have been "modified." Ben is done with the AOSmith water heaters. Express is no longer going to be doing any kind of cleaning or maintenance on these water heaters. We have all conclusion that the only way to fix this problem without modifying the water heater is to replace them completely.

I talked to Jon about this last night, he said since this is an owner expense that I'll have to send something to the owners and have them decide what they want to do. If they want to replace all together at the same time or do them once a month for example. Talking with Express and Intermountain Gas they both said they firmly do not think this should even be an option to the owner, that all AOSmith water heaters need replaced regardless and they need replaced as soon as possible. If the owners decide they do not want to then they will have to sign a waiver basically stating that if a tenant dies FRPM, Express & Intermountain Gas is not held liable for it.

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Tara Gaertner

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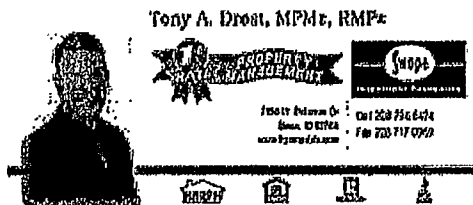
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FR01420

000370

From: Tony Drost
Sent: Thursday, July 21, 2011 9:25 AM
To: Sagecrest; Lizz Loop; Marie Swanson; Sheila Thomason
Subject: RE: Red flag

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Tony A. Drost
www.frpmrentals.com
www.boiseinvestmentproperties.net



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Sent: Wednesday, July 20, 2011 11:23 AM
To: Tony Drost; Lizz Loop; Marie Swanson; Sheila Thomason
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FR01421

000371

Intermountain Gas wants to know what is being done NOW to prevent this from happening tomorrow. I am delivering notices to all doors today. Express is going out and buying a Carbon Monoxide tester today and will be out tomorrow testing everyone's water heater to make sure there are no high readings.

My question is: Can we make the replacing of the water heaters mandatory or does it have to be an option to the owners?

Tara Gaertner

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000372

2

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)
HYMAS, individually and as)
the natural parents of)
PRIVATE FIRST CLASS McQUEN C.)
FORBUSH, USMC (Deceased),)
and BREANNA HALOWELL,)

Plaintiffs,)

vs.)

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY)
OWNERS' ASSOCIATION, INC., an)
Idaho non-profit corporation,)
d/b/a SAGECREST MULTIFAMILY)
PROPERTY OWNERS' ASSOCIATION,)
et al.,)

Defendants.)

DEPOSITION OF JON KALSBECK

April 3 and 4, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

<p>1 A. Agreeable.</p> <p>2 Q. If you answer a question that I ask of</p> <p>3 you, I'm going to proceed with the understanding</p> <p>4 that you understood my question.</p> <p>5 Also agreeable?</p> <p>6 A. Agreeable.</p> <p>7 Q. I want to go back to Exhibit 56 for just</p> <p>8 one minute, if I could. Mr. Palmer was asking you</p> <p>9 about it. I want to make sure I understand.</p> <p>10 Tell me when you're there, sir.</p> <p>11 A. There.</p> <p>12 Q. Okay. And I want to focus with you for</p> <p>13 a moment or two on the second page.</p> <p>14 I understood your testimony, just as a</p> <p>15 background to this question, that you selected</p> <p>16 Mr. Everton? Or did I misunderstand that?</p> <p>17 A. I believe the board selected.</p> <p>18 Q. And you were involved in that process?</p> <p>19 A. Involved in the process, yes.</p> <p>20 Q. And were you the one with the</p> <p>21 ultimate -- were you the ultimate decider of who</p> <p>22 was going to be selected?</p> <p>23 A. No. The board was.</p> <p>24 Q. Did you recommend Mr. Everton?</p> <p>25 A. He's the one that I presented to them.</p> <p>[Page 216]</p>	<p>1 combustion high-efficiency water heater?</p> <p>2 A. No, I did not.</p> <p>3 Q. Did you have any discussion with him</p> <p>4 prior to his preparing and providing you with</p> <p>5 Exhibit 56 about anything having to do with the</p> <p>6 issue of costs that would be incurred to solve the</p> <p>7 problem that you were confronted with?</p> <p>8 A. Was the word "cost"?</p> <p>9 Q. Costs.</p> <p>10 A. No, did not.</p> <p>11 Q. Was it a surprise to you then when you</p> <p>12 saw that solution that was set forth as a best-case</p> <p>13 fix without going to the expense of a new sealed</p> <p>14 combustion water heater system?</p> <p>15 Did that surprise you when you saw that?</p> <p>16 A. I don't recall if it surprised me or</p> <p>17 not.</p> <p>18 Q. Were you expecting that kind of a</p> <p>19 recommendation?</p> <p>20 A. I didn't have any expectations on the</p> <p>21 recommendation.</p> <p>22 Q. Just so I can be clear on this, is it</p> <p>23 your testimony that you didn't give any direction</p> <p>24 to Mr. Everton as far as how -- or what you were</p> <p>25 looking for in terms of a report and</p> <p>[Page 218]</p>
<p>1 Q. You presented him? You brought him</p> <p>2 forth to the board, correct?</p> <p>3 A. Yes.</p> <p>4 Q. And did you have discussions with him</p> <p>5 before he prepared this Exhibit 56?</p> <p>6 A. I believe so.</p> <p>7 Q. And what I'm interested in is if you'd</p> <p>8 look right below -- well, just above "the fixes,"</p> <p>9 in the middle of the page right below what appears</p> <p>10 to be, actually, a filter or a piece of equipment.</p> <p>11 I actually don't know what it is.</p> <p>12 Do you see where it's written, "In an</p> <p>13 effort to provide a best-case fix of this issue</p> <p>14 without going to the expense of new seal combustion</p> <p>15 water heater system, we suggest the following."</p> <p>16 Do you see where I read that?</p> <p>17 A. Yes.</p> <p>18 Q. Did you ask Mr. Everton to come up with</p> <p>19 this type of a recommendation?</p> <p>20 A. No, I did not.</p> <p>21 Q. Did you have any discussion with him</p> <p>22 before he prepared this report about him coming</p> <p>23 forth with a -- some type of a solution that would</p> <p>24 not involve the method that he recommends in the</p> <p>25 prior paragraph which is to furnish a sealed</p> <p>[Page 217]</p>	<p>1 recommendations?</p> <p>2 A. That is correct.</p> <p>3 Q. I want to go to another subject. I'd</p> <p>4 like to have you focus back on the first part of</p> <p>5 August of 2011 after you -- after you all at the</p> <p>6 POA had received the information that we've seen</p> <p>7 here variously today but without going --</p> <p>8 I mean, I can go again to the exhibits.</p> <p>9 I really don't want to take the time.</p> <p>10 Would you agree with me that as of the</p> <p>11 first part of August of 2011, you and the other</p> <p>12 board members at Sagecrest were aware of what's</p> <p>13 being reported to you as a serious potential health</p> <p>14 problem with carbon monoxide issues?</p> <p>15 A. I believe so.</p> <p>16 Q. And what I'd like to know is: When you</p> <p>17 were armed with those facts, as the president of</p> <p>18 the POA, could you explain to me --</p> <p>19 Well, let me start over.</p> <p>20 Did you ever as president of the POA,</p> <p>21 armed with those facts, consider sending a letter</p> <p>22 to all of the owners within the POA alerting them</p> <p>23 to the issues and recommending on behalf of the POA</p> <p>24 that they immediately replace the water heaters</p> <p>25 because of the safety concerns due to carbon</p> <p>[Page 219]</p>

[60] (Pages 216 to 219)

<p>1 A. Yes.</p> <p>2 Q. Bill Lowe, did he participate in it?</p> <p>3 A. Yes.</p> <p>4 Q. Anyone else from Verity?</p> <p>5 A. There were several people, but I don't</p> <p>6 remember their names.</p> <p>7 Q. Okay.</p> <p>8 A. They -- they stepped up.</p> <p>9 Q. "They" being Verity?</p> <p>10 A. Verity.</p> <p>11 Q. What do you mean by "stepped up"?</p> <p>12 A. They took charge and said, "This -- this</p> <p>13 is what we're doing. This is what we need to do."</p> <p>14 Q. What in particular did they say, "This</p> <p>15 is what we need to do"?</p> <p>16 Give me examples of what has to be done.</p> <p>17 A. We need to do testing and we need to</p> <p>18 come up with a plan and implement it.</p> <p>19 Q. What plan did Verity come up with?</p> <p>20 A. They interviewed two or three different</p> <p>21 plumbing companies --</p> <p>22 Q. Okay.</p> <p>23 A. -- to have the situation evaluated.</p> <p>24 The first step was the testing. They</p> <p>25 did two or three plumbing companies to evaluate the</p> <p style="text-align: right;">[Page 276]</p>	<p>1 Q. Okay. The installation of hardwired</p> <p>2 carbon monoxide detectors occurred in every unit,</p> <p>3 as far as you know, right? That has happened? I</p> <p>4 think you testified to that.</p> <p>5 A. Does every unit have a carbon monoxide</p> <p>6 alarm? Yes.</p> <p>7 Q. Hardwired?</p> <p>8 A. Hardwired.</p> <p>9 Q. Yeah.</p> <p>10 Do you know by when that -- that</p> <p>11 occurred?</p> <p>12 A. I believe that happened on 11/12.</p> <p>13 Q. So those units that didn't have them got</p> <p>14 them all in one day?</p> <p>15 A. All in one day.</p> <p>16 Q. So this could have been done in one day</p> <p>17 prior to November 10th, 2012?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. And you learned in October of</p> <p>20 2012 that not all of the units had hardwired carbon</p> <p>21 monoxide detectors, correct?</p> <p>22 A. Learned when?</p> <p>23 Q. In October of 2012 that not all of the</p> <p>24 units had hardwired carbon monoxide detectors,</p> <p>25 correct?</p> <p style="text-align: right;">[Page 278]</p>
<p>1 situation, make recommendations. And then they</p> <p>2 proceeded to work with owners to implement those</p> <p>3 recommendations.</p> <p>4 Q. And those recommendations included</p> <p>5 replacement of A.O. Smith water heaters that were</p> <p>6 contained in the laundry room of various units?</p> <p>7 A. That was a portion of it, yes.</p> <p>8 Q. Okay. And the procedures that Verity</p> <p>9 recommended also included the installation of</p> <p>10 hardwired CO detectors in units that didn't already</p> <p>11 have them?</p> <p>12 A. I do not believe so.</p> <p>13 Q. Okay. So water heaters, testing, and</p> <p>14 anything else specifically?</p> <p>15 A. Not that I recall.</p> <p>16 Q. Okay. And that ultimately was carried</p> <p>17 out, the testing and then the subsequent</p> <p>18 replacement of water heaters, correct?</p> <p>19 A. Yes.</p> <p>20 Q. And that happened over a period of a</p> <p>21 couple of months?</p> <p>22 A. It happened over the period of just less</p> <p>23 than a year, ten months.</p> <p>24 Q. I'm sorry?</p> <p>25 A. Ten months.</p> <p style="text-align: right;">[Page 277]</p>	<p>1 A. That is correct.</p> <p>2 Q. Okay. Again, I don't have another copy.</p> <p>3 I know we're waiting. I apologize because I didn't</p> <p>4 make a whole bunch of stuff to bring down with me.</p> <p>5 But I'm handing you back the CC&Rs</p> <p>6 again. I'm going to have you turn your attention</p> <p>7 to the last page, which I believe is an amendment.</p> <p>8 Take a look at that, and I'll ask you --</p> <p>9 the very last page.</p> <p>10 MR. HAMAN: That's what you have in your</p> <p>11 right hand, Jon.</p> <p>12 MR. HOWELL: Just for the record, this has</p> <p>13 been marked as 153.</p> <p>14 MR. HAMAN: Oh, it has?</p> <p>15 MR. ANDERSON: The whole thing has.</p> <p>16 MR. HAMAN: Oh, the whole thing has? Okay.</p> <p>17 Thank you.</p> <p>18 MR. HOWELL: Yeah.</p> <p>19 THE WITNESS: Okay.</p> <p>20 Q. (BY MR. HAMAN) Have you seen that</p> <p>21 before?</p> <p>22 A. I have.</p> <p>23 Q. Am I correct that's an amendment to the</p> <p>24 existing CC&Rs?</p> <p>25 A. That is correct.</p> <p style="text-align: right;">[Page 279]</p>

[75] (Pages 276 to 279)

<p>1 What info are you referring to?</p> <p>2 A. I can't be sure what info I was</p> <p>3 referring to. It's --</p> <p>4 I -- I --</p> <p>5 Q. And then you go on.</p> <p>6 Correct me if I'm wrong, but there seems</p> <p>7 to be a little bit of a disagreement between you</p> <p>8 and Tara because you're saying, "You're correct</p> <p>9 about the 100 PPM as a guideline for water heater</p> <p>10 flue testing," I presume, but it doesn't require</p> <p>11 that it has to be replaced.</p> <p>12 Did Tara want them to be replaced if her</p> <p>13 testing results reflected 100 parts per million?</p> <p>14 A. All I know at this time was that we had</p> <p>15 gotten a call that there was a high test in one of</p> <p>16 our units, and two days later we got a -- a -- the</p> <p>17 e-mail that said, "It's okay."</p> <p>18 Q. Okay.</p> <p>19 A. And I questioned the discrepancy and why</p> <p>20 it's okay two days later, and that is part of that</p> <p>21 discussion.</p> <p>22 Q. Okay. My question is: Was there a</p> <p>23 disagreement between you and Tara regarding</p> <p>24 replacement of water heaters based on testing</p> <p>25 results?</p> <p style="text-align: right;">[Page 316]</p>	<p>1 of that. It was looking at the documentation.</p> <p>2 Q. Prior to November 10th, 2012, did anyone</p> <p>3 provide you what is marked as Exhibit 59? I</p> <p>4 believe 59 is the testing resulting.</p> <p>5 Did you ever see that before the</p> <p>6 incident?</p> <p>7 A. I received that in October.</p> <p>8 Q. Of 2012?</p> <p>9 A. 2012.</p> <p>10 Q. And when you look at that, you'll see</p> <p>11 that 4624 tested at 100 parts per million in March</p> <p>12 of 2012.</p> <p>13 A. And when I received it, I -- I had not</p> <p>14 looked at each number or what the results were.</p> <p>15 Q. You just scanned it?</p> <p>16 A. Just scanned it.</p> <p>17 Q. And you'll see there's various testing</p> <p>18 in March of 2012, testing results with 100 and</p> <p>19 above.</p> <p>20 A. Yes.</p> <p>21 Q. In March of 20 -- or in October of 2012</p> <p>22 when you saw that, did you call for a special</p> <p>23 meeting?</p> <p>24 A. No, I did not.</p> <p>25 Q. In the annual meeting of October 2012,</p> <p style="text-align: right;">[Page 318]</p>
<p>1 In other words, if Tara is saying, "Hey,</p> <p>2 if this comes back at 100, I want that water heater</p> <p>3 replaced," and you're saying, "No."</p> <p>4 Did that happen?</p> <p>5 A. No, I don't believe so.</p> <p>6 Q. Okay. Do you know that in March --</p> <p>7 Let me ask you this: In March of 2012,</p> <p>8 did you know that Apartment 4624 tested at</p> <p>9 100 parts per million --</p> <p>10 A. I did not.</p> <p>11 Q. -- by Tara?</p> <p>12 When did you --</p> <p>13 Have you ever become aware of that until</p> <p>14 right now?</p> <p>15 A. I became aware of that, I believe, in</p> <p>16 October of 2012.</p> <p>17 Q. Okay.</p> <p>18 MR. HOWELL: Of what unit?</p> <p>19 MR. HAMAN: '12.</p> <p>20 Oh, 4624.</p> <p>21 MR. HOWELL: Sorry.</p> <p>22 Q. (BY MR. HAMAN) So in October of 2012,</p> <p>23 you became aware --</p> <p>24 A. Actually, I have to correct that because</p> <p>25 it was through this litigation that I became aware</p> <p style="text-align: right;">[Page 317]</p>	<p>1 did you inform the members of Exhibit 59?</p> <p>2 A. Did I inform them of this --</p> <p>3 Q. Exhibit.</p> <p>4 A. -- paperwork?</p> <p>5 Q. Yes.</p> <p>6 A. I don't believe so.</p> <p>7 Q. Did you inform them with your --</p> <p>8 You said you scanned it. Did you inform</p> <p>9 the members at the annual meeting of what you</p> <p>10 scanned on Exhibit 59?</p> <p>11 A. Excuse me. "Scan" is -- I mean,</p> <p>12 glancing at it, looking at it.</p> <p>13 Q. All right. Did you inform them that you</p> <p>14 received what is known as Exhibit 59?</p> <p>15 A. I do not believe so.</p> <p>16 Q. Did you inform them that you looked at</p> <p>17 it or scanned at it or glanced at it?</p> <p>18 A. I don't believe so.</p> <p>19 Q. As you sit here today, do you have any</p> <p>20 personal knowledge as to whether anyone at</p> <p>21 First Rate or the Sagecrest board ever informed</p> <p>22 Matt Switzer of a potential carbon monoxide problem</p> <p>23 in 4624 prior to November 10th, 2012?</p> <p>24 A. I do not know.</p> <p>25 Q. Exhibit 14 is the notice that has been</p> <p style="text-align: right;">[Page 319]</p>

[85] (Pages 316 to 319)

<p>1 the units of 23, 28, or 37 replaced before 2 November 10th, 2012? 3 A. Yes. 4 Q. How many in 23? 5 A. I believe one, maybe two. 6 Q. How many in 28? 7 A. I'm not quite sure. I know there was 8 one. 9 Q. And 37? 10 A. 37, I know there was one or two. 11 Q. And were those all replaced after July 12 2011 but before November 10th, 2012? 13 A. I don't know. 14 Q. Were they replaced during this time 15 frame where there's clearly a discussion and a 16 concern between First Rate and Sagecrest about 17 water heater issues and problems? 18 A. There were some replaced in the July 19 2011 time frame. 20 Q. Here's my question: I believe you 21 testified yesterday that in October -- I believe it 22 was October 25th, 2012 -- you learned two things: 23 One, that not all of the units had the hardwired 24 carbon monoxide detectors installed, correct? 25 A. That is correct.</p> <p style="text-align: right;">[Page 332]</p>	<p>1 were some in each building. 2 Q. But you pay a monthly assessment and you 3 pay -- and when someone like First Rate comes in 4 and replaces a dishwasher or replaces a water 5 heater, you get billed for that, right? 6 A. Yes. 7 Q. You didn't get a bill for the remaining 8 two units in Building 23, the remaining three units 9 in Building 28, the remaining two units in Building 10 37, so why were you shocked to learn that not all 11 the water heaters were replaced as of October 25th, 12 2012, if you knew or should have known that not all 13 the water heaters in your three buildings were 14 replaced? 15 MR. HOWELL: Objection; form. 16 MR. ANDERSON: Was there an answer? 17 MR. HAMAN: No. He's thinking. 18 MR. ANDERSON: Okay. 19 THE WITNESS: The program was put in place, 20 and I thought it was progressing under First Rate's 21 guidance. 22 Q. (BY MR. HAMAN) I understand what you're 23 saying, but I'm still -- I'm just confused as to 24 why you would be shocked when you knew that water 25 heaters weren't replaced in your units.</p> <p style="text-align: right;">[Page 334]</p>
<p>1 Q. And that shocked you? 2 A. Yes, it did. 3 Q. And you also learned, correct me if I'm 4 wrong, that not all of the units had water heaters 5 replaced. 6 Is that correct? 7 A. That is correct. 8 Q. And that shocked you? 9 A. Yes, it did. 10 Q. Why were you shocked if the units -- 11 water heaters in your own buildings weren't 12 replaced by then? 13 A. Because I believed First Rate was 14 handling it in setting up the program as they said 15 they would. 16 Q. But it's your building. You would have 17 known before October 25th that water heaters 18 weren't replaced, right? So why were you shocked? 19 MR. HOWELL: Objection; form. 20 Q. (BY MR. HAMAN) Do you see what I'm 21 getting at? 22 A. I see what you're getting at. 23 Q. So why were you shocked? 24 A. I didn't know which ones had been 25 replaced and which ones hadn't. Like I said, there</p> <p style="text-align: right;">[Page 333]</p>	<p>1 A. I don't know -- 2 MR. HOWELL: Objection; form. 3 Q. (BY MR. HAMAN) Did you have hardwired 4 CO detectors in all of the units in the three 5 buildings you owned by October 25th, 2012? 6 A. We did not. 7 Q. Did some of them have it? 8 A. Yes. 9 Q. So it's the same line of questioning. 10 You said you were shocked to learn that 11 not all of the units had CO detectors, hardwired. 12 Why would you be shocked if you knew or 13 should have known that not all of your units had CO 14 detectors installed? 15 MR. HOWELL: Objection; form. 16 THE WITNESS: We did not track it. 17 Q. (BY MR. HAMAN) You don't track the 18 bills that come to you? 19 MR. HOWELL: I don't think he was -- 20 MR. HAMAN: Okay. I'm sorry. 21 MR. HOWELL: Were you done with your answer? 22 THE WITNESS: Where are we at? 23 Q. (BY MR. HAMAN) You said, "We did not 24 track it," and I cut you off. I apologize. 25 Go ahead.</p> <p style="text-align: right;">[Page 335]</p>

[89] (Pages 332 to 335)

<p>1 A. We review them, but in December/November 2 of 2011, we made a request to Tara to install CO 3 detectors in all of our units, and we believed that 4 was being done. 5 Q. And you testified this morning that it 6 takes one day to do that. 7 As of October 25th, it hadn't been done 8 in at least all of your units. 9 A. I understand that. 10 MR. HOWELL: There's no question. 11 Q. (BY MR. HAMAN) You hadn't received a 12 bill from First Rate for the actual unit and the 13 labor to put it in, so why were you shocked? 14 MR. HOWELL: Objection; form. 15 THE WITNESS: I was more shocked that I was 16 unaware that it was not done. 17 MR. ANDERSON: Could you read that answer 18 back, please. 19 (Record read by reporter.) 20 Q. (BY MR. HAMAN) Then the next day, you 21 have the annual meeting? 22 A. The next day -- 23 Q. October 26th, 2012. 24 A. Yes, I believe so. 25 Q. Did you inform the members at this</p> <p style="text-align: right;">[Page 336]</p>	<p>1 Q. Wouldn't you have a duty to inform the 2 members of this health and safety concern? 3 MR. HOWELL: Objection; form, calls for a 4 legal conclusion. 5 Q. (BY MR. HAMAN) Wouldn't you have a duty 6 to inform them of this? 7 MR. HOWELL: Same objection. 8 THE WITNESS: I would tend to agree. 9 Q. (BY MR. HAMAN) Okay. I'm trying to 10 wrap this up because I know it's been long. 11 Along the same lines, I believe you 12 testified yesterday that you wouldn't see 13 communications between -- not all communications 14 between First Rate and owners regarding water 15 heater replacements or installing hardwired carbon 16 monoxide detectors. 17 Is that right? 18 A. That's correct. 19 Q. But you, as a member and an owner -- 20 And you wear two separate hats. You are 21 president, but you're also a member, right? 22 A. Yes. 23 Q. So if you instructed First Rate, i.e., 24 Lizz, to send out Exhibit 53 to all the members, 25 you would have gotten that as a member, right?</p> <p style="text-align: right;">[Page 338]</p>
<p>1 annual meeting of your shock or your concern about 2 the water heaters and the CO hardwired detectors at 3 that meeting? 4 A. I'm not sure how that was conveyed. CO 5 issues were conveyed to the members. 6 Q. Did you -- my question is -- 7 Let me break it up. 8 Did you convey to the owners and the 9 board at this annual meeting, "Hey, guys, I just 10 learned yesterday that not all of the water heaters 11 in the complex," and those water heaters are the 12 A.O. Smith water heaters that are in the laundry 13 room, "have been replaced as we thought they should 14 have been"? 15 Did you say that to the members or 16 something to that effect? 17 A. I don't recall saying that. 18 Q. And did you say something to the effect 19 that, "Hey, guys or gals, not all of the hardwired 20 CO detectors have been put in, and I just came to 21 this revelation yesterday, and I'm letting you 22 know"? 23 Did you say anything like that to the 24 members? 25 A. I don't recall.</p> <p style="text-align: right;">[Page 337]</p>	<p>1 MR. HOWELL: Objection; form. 2 Q. (BY MR. HAMAN) Wouldn't that make 3 sense? 4 A. It would make sense, but sometimes they 5 didn't include me because I'd already seen it. 6 Q. Wouldn't you think you'd call up 7 First Rate and say, "I haven't gotten it," which 8 means you haven't sent it to anybody else either? 9 MR. HOWELL: Objection; form. 10 THE WITNESS: I believe I would make a phone 11 call and ask if it was done. 12 Q. (BY MR. HAMAN) Yet you didn't do that, 13 did you? 14 A. I don't recall. 15 Q. And if a communication was sent from 16 First Rate to various owners regarding carbon 17 monoxide issues, carbon monoxide detector issues, 18 water heater issues, you would expect to receive 19 that as a member, right? 20 A. Yes. 21 Q. Yet you didn't? 22 MR. HOWELL: Objection; form. 23 THE WITNESS: I don't know that I -- 24 MR. ANDERSON: I'm going to object to the 25 form, too.</p> <p style="text-align: right;">[Page 339]</p>

[90] (Pages 336 to 339)

<p>1 A. It says Donna Nee. 2 Q. Was she the secretary or just somebody 3 who volunteered? 4 A. I believe she worked for H&H. 5 Q. Okay. With respect to the bullet points 6 I referred you to, what filter change had been 7 going on in 2009? 8 A. I believe H&H had put in place a system 9 to change the filters out on a regular basis. 10 Q. What precipitated that procedure, if you 11 know? 12 A. Flooding. 13 Q. Flooding caused by what? 14 A. Several issues that was found out over 15 the course of time. 16 One was high Meridian water pressure. 17 Another one was freezing of coils in the heating 18 system. Another one was the expansion tank. And 19 there was one more that I -- 20 There were four of them, and I don't 21 recall the fourth. 22 Q. And the freezing coils, were they inside 23 the air blower? 24 A. I believe so, but I'm not sure. I'm not 25 that familiar with the system.</p> <p style="text-align: right;">[Page 356]</p>	<p>1 Q. Okay. How did changing filters 2 ameliorate those problems, if you know? 3 A. From my understanding, as it was 4 explained by H&H, was that the tenants didn't 5 change filters and they slowed the air down enough 6 to freeze the coils so the air flow was reduced 7 when the air conditioner ran. 8 Q. So what did H&H do with respect to the 9 filters? 10 A. They set up a program to have -- 11 I believe the first initial started to 12 have tenants come in and pick them up and install 13 them in their units. 14 Q. Did they have to pay for the filters? 15 A. The tenants? 16 Q. Yes, sir. 17 A. I don't recall. 18 Q. As president, did you track whether or 19 not the -- 20 Well, let me back up. 21 How many filters are necessary for 22 Sagecrest in terms of the air handlers? 23 A. I believe there are 192. 24 Q. And how often was H&H changing them? 25 A. I don't remember now.</p> <p style="text-align: right;">[Page 358]</p>
<p>1 Q. Air handler? 2 A. (Witness indicates.) 3 Q. And the expansion tank, where is that 4 located? 5 A. It's above -- 6 When I've seen them, it's above the 7 water heater, but it can be -- 8 I really don't know. 9 Q. Okay. Did your units not have these 10 problems? 11 A. Our units have not had these problems. 12 Q. Okay. So the coils are inside a unit, 13 and the expansion tank is inside a unit or various 14 units? 15 A. I believe so. 16 Q. In Meridian, I think all units have to 17 have expansion tanks. 18 Is that your understanding? 19 A. I don't know that. 20 Q. What were the other two problems that 21 precipitated the filter change procedure being 22 implemented? 23 You said freezing coils and expansion 24 tank issues. 25 A. The high water pressure in Meridian.</p> <p style="text-align: right;">[Page 357]</p>	<p>1 Q. And from what you're saying, I'm getting 2 the impression that this was H&H that came up with 3 this idea and not the board? 4 A. That is correct. 5 Q. And that's because you recall the events 6 surrounding this? 7 A. Yes. 8 Q. Okay. Did H&H charge the board, or the 9 association more appropriately, for the filters it 10 provided to the tenants? 11 A. The H&H proposal, as I remember it, was 12 that they wanted to buy them in bulk to get a 13 reduced price because they were an unusual size 14 filter, and the association picked up that bill to 15 buy them in bulk. 16 Q. Okay. So the association used funds 17 from the association's bank account to purchase 18 items for the interiors of all of the units at 19 Sagecrest? 20 A. Because -- 21 Q. Just "yes" or "no." 22 A. Yes. 23 Q. Okay. And you were going to add 24 something. I won't stop you. I just want to make 25 sure you answer my question first.</p> <p style="text-align: right;">[Page 359]</p>

[95] (Pages 356 to 359)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)


I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:


That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 15th day of April 2014.


ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.



My Commission Expires: 2-14-17

[Page 457]

3

From: VJK <aire1@pacbell.net>
Sent: Wednesday, August 03, 2011 9:58 PM
To: Bill Raff; Sheila Thomason; Tony Drost
Cc: Sagecrest; Lizz Loop; William and Beth Raff
Subject: RE: Water Heater Needs Replaced ASAP
Attachments: image009.jpg; image003.jpg; image004.jpg; image005.jpg; image006.png; image007.png; image008.png

Well, we were just trying to clarify since the POA is being asked to research this issue with mechanical engineers and such.

Jon,

What can the association do to get a professional (licensed mechanical engineer) in to solve this once and for all?

The fix is to replace the problem units with a new design water heater. We have asked Sheila to make sure that these new water heaters do not create the same issues and the information sent appears to indicate and express plumbing states that the new WH are better designed.

Sheila and us have discussed enlarging the air intake from the living room on C models and the exhaust is being enlarged with the new WH during install according to Sheila. The A and B models are another issue since they are located in the same room as the dryers. The solution at this point is to add a vent from the hall and build a partial wall to keep the lint from entering the WH area. This solution is waiting a reply from Sheila to see the feasibility of these solutions. Have not heard to date.

The long term fix is having approved WH in a location that is kept clean. In addition, Sheila and us discussed the need to install CO2 monitors in each unit. Still waiting to hear if this is going to be done.

Just trying to stay in the loop, since the letter went out without the POA seeing it first and was only made aware of the letter after receiving calls regarding a letter we had not seen. We do not know of any other options under discussion at this time.

Thanks.

 Virginia and Jon 

--- On Wed, 8/3/11, Tony Drost <Tony@FRPMRENTALS.COM> wrote:

From: Tony Drost <Tony@FRPMRENTALS.COM>
Subject: RE: Water Heater Needs Replaced ASAP
To: "VJK" <aire1@pacbell.net>, "Bill Raff" <wmraffdesigns@yahoo.com>, "Sheila Thomason" <Sheila@FRPMRENTALS.COM>
Cc: "Sagecrest" <sagecrest@FRPMRENTALS.COM>, "Lizz Loop" <Lizz@FRPMRENTALS.COM>, "William and Beth Raff" <raffbeth@yahoo.com>

CONFIDENTIAL

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4

From: Sheila Thomason
Sent: Wednesday, August 03, 2011 11:19 PM
To: Jon and Virginia Kalsbeek; William and Beth Raff; Tony Drost
Cc: Sagecrest; Lizz Loop; William and Beth Raff
Subject: Re: Water Heater Needs Replaced ASAP

What part were you not aware of? Everything tony mentioned below has been discussed with you.

Here is a re-cap:

I spoke with you at 6:45 friday night letting you know that I was still contacted owners regarding the unsafe water heaters. It was important to me that they received this information as soon as possible so phone calls were made. This would have been done earlier in the day by I was unfortunately already booked with move out inspections all day. I told you that I was purchasing and installing carbon monoxide detector and delivering them to the tenants on friday night. This was finished at appx 10:45 pm friday night with the help of missy and lizz. All tenants were informed of the situation, given instructions on the carbon monoxide detectors, and were told to contact intermountain gas if they alarmed. This was for the safety of the tenants. I found out today that one of them alarmed while the tenant was sleeping on Monday night. They contacted the gas company and they shut the service off. If this would have happened friday night because I had to wait for your approval to send an email to specific owners regarding their properties there may have been different results that I couldn't live with. Was there a problem with the email that I sent that I am not aware of? Once the approvals for replacements came in we started replacing water heaters. Express plumbing has been replacing water heaters from 9-6 the last couple days. We are moving the carbon monoxide detectors around as water heaters are being replaced so they are in the units that need them at this point. We still have 2-3 owners that we haven't made contact with. We will follow up with them tomorrow. After that it will be up to each owner if they want to pay to have carbon monoxide detectors in their units. They run anywhere from \$18-\$95. The plug in ones are not recommended by the gas company due to the location of the outlets. They need to be installed at eye level.

The partial wall idea was discussed with express plumbing and I informed you that it wouldn't be very effective. When the dryers get turned on the dust and lint fly everywhere so a 2 ft wall won't do much. I expressed this over the phone with you. If you still feel the need for me to contact a building inspector at the city of meridian for approval on this I can. I will not have time to do this now for at least another week. These are the same inspectors that passed this in the first place and the same inspectors that didn't catch the fake vent in the lower units of the A floor plan. Which is the only vent that allows air into that area. Not much faith in them.

I attempted to contact chris for estimates on expanding the vents and was unsuccessful yesterday. I will also ask him for estimates on installing more vents around the areas to include other options for the doors themselves. I printed out the different floor plans to make annotations for air improvements. We also now have empty units we can enter for all 3 floor plans. This will be done by friday.

When the filters are changed every 3 months we are entering each unit at which time the cleanliness around the water heaters will be checked and rectified. We should also send a notice to all tenants letting them know the importance of keeping this area cleaned. Bill mentioned having them sign something showing they were informed.

I think that's it. We should all be on the same page by now. I'll let you know what stan says.

Sheila Thomason- First Rate Property Management

From: "VJK" <aire1@pacbell.net>
Date: Wed, 3 Aug 2011 22:11:05 -0600

CONFIDENTIAL

FR01672

000385

To: Bill Raff<wmraffdesigns@yahoo.com>; Sheila Thomason<Sheila@FRPMRENTALS.COM>; Tony Drost<Tony@FRPMRENTALS.COM>
Cc: Sagecrest<sagecrest@FRPMRENTALS.COM>; Lizz Loop<Lizz@FRPMRENTALS.COM>; William and Beth Raff<raffbeth@yahoo.com>
Subject: RE: Water Heater Needs Replaced ASAP

Thank you, this is helpful information which we were not aware of. Thanks

Agree an AC/DC detector permanently installed is the best solution for CO2 Detectors.



--- On Wed, 8/3/11, Tony Drost <Tony@FRPMRENTALS.COM> wrote:

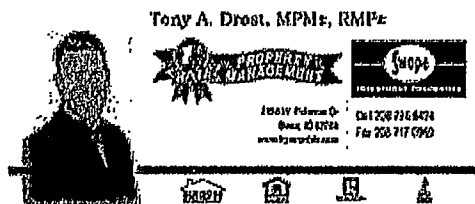
From: Tony Drost <Tony@FRPMRENTALS.COM>
Subject: RE: Water Heater Needs Replaced ASAP
To: "VJK" <airel@pacbell.net>, "Bill Raff" <wmraffdesigns@yahoo.com>, "Sheila Thomason" <Sheila@FRPMRENTALS.COM>
Cc: "Sagecrest" <sagecrest@FRPMRENTALS.COM>, "Lizz Loop" <Lizz@FRPMRENTALS.COM>, "William and Beth Raff" <raffbeth@yahoo.com>
Date: Wednesday, August 3, 2011, 9:07 PM

Sheila:

Please provide the answers to the questions below on information that Jon has not seen. Sheila, please cut and paste an internet photo of the CO2 detector you are using. Is this a long term install or temporary. I would think we would install permanent detectors and I would love to see one that is AC/DC so that we don't have to worry about keeping up on batteries. Please let me know what Stan has to say. I believe that I heard that the small wall/divider was believed not to be good? If that is the case please explain and have we identified other solutions?

Jon:

We have purchased and installed CO2 detectors in all units identified as super hazardous. I am unsure the type.



Tony A. Drost

www.frpmrentals.com

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FR01673

000386

copy

**SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC.**

P.O. BOX 190396
BOISE, IDAHO 83719
PHONE # 388-3900 FAX # 388-1684

From: Jon Kalsbeek (President of Sagecrest Multi Family POA)

TO: John Sonmez Real Estate Three LLC
9733 W. Brogan Dr.
Boise, ID. 83709
208-546-9876 or 208-371-8497

Ref: Management of your unit 1805 East Overland Road #24
Meridian, Idaho 83642.

The Sagecrest POA has recently been informed by Park Place Management that they have replaced your management company which is in direct violation of the Covenants, Conditions and Restrictions (CC&Rs) as set forth by the board of directors and majority members within the CC&Rs recorded on June 22, 2007 at 04:34 PM. And more specifically section 6.6A that states:

Section 6.6 A

Management Agent. The Board of Directors will contract or employ for the Association a management agent ("Manager") at a compensation established by the Board of Directors and Manager to perform such duties and services as the Board of Directors shall authorize, including, but not limited to the duties listed in Section 3.3 and enforcement of section 5 hereof. This management company for now will be H & H Properties L.L.C. with offices located at 520 S. Orchard Suite 101 Boise, Id. 83705. This said management company will manage this association as well as all rental units within Sagecrest Property Owners Association, but at any time could be removed from this management with a 75% vote from the current members and also with a sixty (60) day written notice from these same members to this said management company notifying them of this decision. Grandfathered into this agreement as of this recording date is allowing owners that are currently managing their own properties will be allowed to continue the management until the property is sold at which time the new owner of the property would contract with the association's assigned manager. All owners that currently employ another management company would be required to change to the association's manager at the completion of the contract. The Board of Directors reserves the right to buy out the other manager's contract if they feel it is in the best interest of this association.

In order for the association to maintain consistency throughout the complex, over 75% of the members voted to have a single management company. Therefore The CC&Rs state, an owner shall have their property managed by the company selected by

CONFIDENTIAL

FR05862

000388

6

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)
HYMAS, individually and as)
the natural parents of)
PRIVATE FIRST CLASS McQUEN C.)
FORBUSH, USMC (Deceased),)
and BREANNA HALOWELL,)

Plaintiffs,)

vs.)

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY)
OWNERS' ASSOCIATION, INC., an)
Idaho non-profit corporation,)
d/b/a SAGECREST MULTIFAMILY)
PROPERTY OWNERS' ASSOCIATION,)
et al.,)

Defendants.)

DEPOSITION OF TONY DROST

April 1 and 2, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

[Page 1]

<p>1 Sheila, and you dated August 3rd, 2011. 2 MR. ANDERSON: Well, are you at the top of 3 108? 4 MR. CLARK: Middle of the second page of 5 445. 6 THE WITNESS: Okay. I'm sorry. 7 What's the question? 8 Q. (BY MR. CLARK) Do you remember receiving 9 this e-mail? 10 A. I suppose. 11 Q. It says, "This was" -- by Mr. Kalsbeek. 12 "This was discussed in depth with First Rate 13 Property Management and Sheila." 14 Do you recall the conversation with 15 Mr. Kalsbeek around August 3rd regarding whose 16 responsibility the water heaters were? 17 A. There's more to this, correct? 18 Q. There may be. I -- I don't know. 19 We're going forward. 20 A. Yeah, but I think there's a lot more 21 correspondence that follows. 22 Q. Okay. 23 A. But, yeah, this is Jon -- 24 Because Bill is included saying -- which 25 wasn't the case, but just to clarify, "The water 93</p> <p style="text-align: right;">[Page 93]</p>	<p>1 But I wrote, "Everybody understands 2 that. As you have requested, FRPM is keeping the 3 POA informed of" -- 4 THE REPORTER: Please slow down. 5 THE WITNESS: I'm sorry. I thought you were 6 good at that. 7 -- "of any major issues happening with 8 the complex." 9 We consider those global issues. Global 10 issues consisted of the CO testing. Global issues 11 consisted of the water heaters. Global issues 12 consisted of leaks with windows, stairwells, light 13 bulbs. 14 Jon -- 15 Q. (BY MR. CLARK) Who -- 16 A. -- Jon was in control, and we did what 17 he told us to do. 18 Q. Who's responsible for the global issues? 19 A. The POA through Jon. 20 Q. Let me go to the front of page 108. I'm 21 trying to figure out how this particular e-mail 22 worked. 23 It looks like there's a letter from -- 24 well, there's an e-mail and then there's -- it 25 looked like somebody added additional information 95</p> <p style="text-align: right;">[Page 95]</p>
<p>1 heaters are interior items of each unit and, 2 therefore, an owner's choice on how to handle the 3 situation." 4 That wasn't how it was in reality, but 5 for Bill's benefit, that's what was written here. 6 And I recall at a later time Sheila calling him out 7 and saying total caca. 8 Q. Well, you're disputing that, "The water 9 heaters are interior items of each unit and, 10 therefore, the owner's choice on how to handle the 11 situation"? 12 A. Do I recall reading that? Was that the 13 question? 14 Q. Well, no. Are -- 15 MR. ANDERSON: He said are you disputing it? 16 THE WITNESS: That he wrote that? 17 Q. (BY MR. CLARK) No, that -- 18 He's making the contention, and I'm 19 asking you if you dispute that contention. 20 A. Absolutely. 21 Q. Okay. What is your contention that -- 22 What do you claim that is wrong about 23 that statement or the contents of that -- 24 A. Like I said, there's more to this that 25 might help. 94</p> <p style="text-align: right;">[Page 94]</p>	<p>1 in response. 2 Do you recall receiving this e-mail on 3 the first page, FR 0044? 4 A. So starting with, "The fix is to 5 replace"? 6 Q. Yeah. 7 A. Okay. 8 Q. Do you know who wrote that information? 9 A. It looks like it's signed by Virginia 10 and Jon on the bottom. 11 Q. Well, that's what I -- it -- 12 It says, "Jon," and then it's signed by 13 Virginia and Jon, and I'm just wondering if this is 14 a -- it's -- how this thing is set up, if you know. 15 A. No, I don't know. I think that Bill and 16 Jon are having a conversation. 17 Q. Okay. 18 A. I don't know who said what. 19 Q. Okay. 20 A. On the -- 21 MR. ANDERSON: There's no question. No 22 question. Just hold tight. 23 THE WITNESS: Okay. 24 Q. (BY MR. CLARK) Would you look at the 25 next page, Exhibit 9. 96</p> <p style="text-align: right;">[Page 96]</p>

[30] (Pages 93 to 96)

<p>1 Q. Okay. What else?</p> <p>2 A. 5.1. We -- not -- not that it -- they</p> <p>3 declined. We just didn't charge for the overtime</p> <p>4 and whatnot of the on-site. It states 30 hours per</p> <p>5 week, and that changed.</p> <p>6 Q. Okay. Anything else?</p> <p>7 A. The 6.1. 6.2.3, we never charged for</p> <p>8 copies. 6.2.5, advertising costs exceed \$500, that</p> <p>9 changed.</p> <p>10 Q. Let me back up to 6.1.</p> <p>11 What changed in 6.1?</p> <p>12 A. Jon had agreed to increase the</p> <p>13 management fees to \$300 -- or actually, I don't</p> <p>14 recall the dollar amount. Sorry. It could have</p> <p>15 been 3; it could have been 5. I don't remember.</p> <p>16 Q. Okay. And then you said 6.2.3, never</p> <p>17 charged for copy charges, correct?</p> <p>18 A. That's correct.</p> <p>19 Q. And then what else did you say?</p> <p>20 A. 6.2.5.</p> <p>21 Q. How did that change?</p> <p>22 A. The POA paid for some For Rent magazine,</p> <p>23 and I think its cost was higher than that alone.</p> <p>24 Q. Okay. Anything else other -- anything</p> <p>25 else about 6.2.5 that changed?</p> <p style="text-align: center;">237</p> <p style="text-align: right;">[Page 237]</p>	<p>1 consistency there.</p> <p>2 Q. Would you agree with me that if a tenant</p> <p>3 had a broken dishwasher and it needed to be</p> <p>4 replaced, that did not need to go through Jon?</p> <p>5 A. I would agree with you that that would</p> <p>6 be the normal case, but I believe that we had that</p> <p>7 exact same scenario where he did get involved. Or</p> <p>8 maybe it was a microwave. I can't recall.</p> <p>9 Q. Okay. You would agree with me that the</p> <p>10 POA or any board member didn't have to give their</p> <p>11 consent to, in my hypothetical, replace a</p> <p>12 dishwasher, assuming that it wasn't their own unit.</p> <p>13 Would you agree with that?</p> <p>14 A. The other board members rarely directed</p> <p>15 us.</p> <p>16 Q. Okay. But let's --</p> <p>17 I mean, with all due respect, listen to</p> <p>18 my question.</p> <p>19 A. Okay. Sorry.</p> <p>20 Q. Would you agree with me that none of the</p> <p>21 board members, including Mr. Kalsbeek, had to give</p> <p>22 permission or consent to replace a broken</p> <p>23 dishwasher if it needed replacing in some unit,</p> <p>24 assuming that it's not in one of their units?</p> <p>25 A. And it's not a trend?</p> <p style="text-align: center;">239</p> <p style="text-align: right;">[Page 239]</p>
<p>1 A. We later --</p> <p>2 There was -- there was talk, I can't</p> <p>3 remember if we actually implemented it, of billing</p> <p>4 back the owners a certain portion of the</p> <p>5 advertising.</p> <p>6 Q. Okay. Any other --</p> <p>7 A. 7.1.</p> <p>8 Q. What about it?</p> <p>9 A. Again, we -- we were required to go</p> <p>10 through Jon on -- on most matters.</p> <p>11 Q. Anything else?</p> <p>12 A. Not that I caught.</p> <p>13 Q. When you say in 7.1 that you were</p> <p>14 "required to go through Jon on most matters," what</p> <p>15 do you mean by "most"?</p> <p>16 A. Well, first of all, I think Tara would</p> <p>17 be the better person to answer that because I just</p> <p>18 was -- all I got was the phone calls from Jon when</p> <p>19 he was mad that she had done something without</p> <p>20 going through him first.</p> <p>21 Q. Okay. Are you able to tell us what</p> <p>22 things were required to go through Jon and what</p> <p>23 things were not?</p> <p>24 A. No. I think that was part of the</p> <p>25 problem was that it was not -- there was not</p> <p style="text-align: center;">238</p> <p style="text-align: right;">[Page 238]</p>	<p>1 Q. I don't know what you mean by "trend."</p> <p>2 A. A global issue.</p> <p>3 Q. Sure. If it's just in one unit.</p> <p>4 A. Then I would agree that we had</p> <p>5 permission to go forward.</p> <p>6 Q. Okay.</p> <p>7 A. Contact the owner.</p> <p>8 Q. What about as it pertains to a trend or</p> <p>9 a global issue, as you call it?</p> <p>10 A. Then yes, that -- that needed to go</p> <p>11 through Jon.</p> <p>12 Q. Is that based upon a conversation that</p> <p>13 you had with Mr. Kalsbeek?</p> <p>14 Or a better question: Where did you</p> <p>15 learn that or how did you come to that conclusion?</p> <p>16 A. Because every time they did go through</p> <p>17 Jon, they were reprimanded. I would get the phone</p> <p>18 call.</p> <p>19 I believe that there's plenty of e-mails</p> <p>20 where he's making that clear that, "This should</p> <p>21 have gone through me before you did this."</p> <p>22 Q. Jump to Exhibit 91, please.</p> <p>23 MR. ANDERSON: What's the date?</p> <p>24 MR. HOWELL: August 24, 2011.</p> <p>25 Q. (BY MR. HOWELL) Do you have that in</p> <p style="text-align: center;">240</p> <p style="text-align: right;">[Page 240]</p>

[66] (Pages 237 to 240)

<p>1 was upset?</p> <p>2 A. As the Molly Collins -- I believe that</p> <p>3 was her name -- incident was occurring, I wasn't</p> <p>4 part of that. Tara was handling it.</p> <p>5 I got a call from Jon. Again, we talked</p> <p>6 about -- I can't recall the date, but I can look at</p> <p>7 the calendar because I remember exactly where I was</p> <p>8 at.</p> <p>9 He was upset that she would instruct a</p> <p>10 tenant to call the fire department or Intermountain</p> <p>11 Gas. He said that she was continually not</p> <p>12 following his procedures as revised, that she</p> <p>13 should have gone over there and tested it, and that</p> <p>14 it created a liability for myself and the POA by</p> <p>15 calling the authorities or public entity or</p> <p>16 something like that.</p> <p>17 Q. Is it your testimony that that phone</p> <p>18 call is recorded?</p> <p>19 A. Oh, I don't know if that phone call was</p> <p>20 recorded.</p> <p>21 Q. It's the meeting that's recorded,</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. Okay. If you can look at Exhibit 96,</p> <p>25 please.</p> <p style="text-align: center;">257</p> <p style="text-align: right;">[Page 257]</p>	<p>1 guess, are you surprised that Sheila is sending</p> <p>2 this out?</p> <p>3 Is that --</p> <p>4 A. That's my recollection. I --</p> <p>5 It was kind of an in-your-face type</p> <p>6 of --</p> <p>7 That's the impression I got. I just</p> <p>8 thought it was a bold move. That's all.</p> <p>9 Q. Why?</p> <p>10 A. I don't know. I just -- I wasn't</p> <p>11 expecting it.</p> <p>12 Q. Did you talk to Sheila about the letter</p> <p>13 or e-mail?</p> <p>14 A. Not that I recall.</p> <p>15 Q. What did you do after you received and</p> <p>16 reviewed it? Did you take any steps or contact</p> <p>17 anybody to discuss it?</p> <p>18 A. I -- I don't know. I don't recall.</p> <p>19 Q. At the time of this e-mail, was</p> <p>20 First Rate still managing the POA?</p> <p>21 A. I don't believe so.</p> <p>22 Q. Okay. Was First Rate still managing</p> <p>23 independent apartments or buildings within</p> <p>24 Sagecrest?</p> <p>25 A. I don't believe so.</p> <p style="text-align: center;">259</p> <p style="text-align: right;">[Page 259]</p>
<p>1 Let me know when you have that in front</p> <p>2 of you.</p> <p>3 A. I do.</p> <p>4 Q. This purports to be an e-mail dated</p> <p>5 November 27, 2012, and you are cc'd on the e-mail.</p> <p>6 Do you recall receiving this e-mail?</p> <p>7 A. I do.</p> <p>8 Q. What did you do after you received it?</p> <p>9 A. Well, I'm not absolutely sure, but I</p> <p>10 think I expressed a concern with Sheila jumping in</p> <p>11 with this.</p> <p>12 Q. What were you concerned about in that</p> <p>13 regard?</p> <p>14 A. Well, I had been told to not talk about</p> <p>15 it, and I just was surprised.</p> <p>16 Q. Who were you told --</p> <p>17 What are you referring to when you say</p> <p>18 you were told not to talk about it?</p> <p>19 A. The letter of revocation.</p> <p>20 Q. But this is November 27, and you had</p> <p>21 already gone to the Meridian Police Department,</p> <p>22 correct?</p> <p>23 A. That letter said I could talk to the</p> <p>24 police.</p> <p>25 Q. Okay. And so you're surprised -- I</p> <p style="text-align: center;">258</p> <p style="text-align: right;">[Page 258]</p>	<p>1 Q. Did you do anything or contact anybody</p> <p>2 about the substance of this e-mail after you</p> <p>3 received it?</p> <p>4 A. I -- I may have, but I -- I don't</p> <p>5 recall.</p> <p>6 Q. Is there anything in the e-mail that you</p> <p>7 recall disagreeing with?</p> <p>8 A. Would you like me to read it?</p> <p>9 Q. Well, I guess --</p> <p>10 No. If you didn't do anything about it,</p> <p>11 then no?</p> <p>12 A. I --</p> <p>13 MR. ANDERSON: It's good.</p> <p>14 Q. (BY MR. HOWELL) As I indicated before,</p> <p>15 I'm going to jump around on you.</p> <p>16 First Rate was being paid to manage the</p> <p>17 Sagecrest POA, correct?</p> <p>18 A. Yes, sir.</p> <p>19 Q. And the contract spells out a monthly</p> <p>20 management fee, right?</p> <p>21 A. Yes, sir.</p> <p>22 Q. Was there any other fees on top of that</p> <p>23 that you were receiving from the POA?</p> <p>24 A. Reimbursement for wages -- or actually</p> <p>25 payroll expenses.</p> <p style="text-align: center;">260</p> <p style="text-align: right;">[Page 260]</p>

[71] (Pages 257 to 260)

<p>1 Q. Because it's putting you on notice of 2 something? 3 A. Yes, sir. 4 Q. Did you know Mr. Kalsbeek prior to 5 February/March 2010? 6 A. Not that I'm aware. 7 Q. Did anyone, including Mr. Kalsbeek, ever 8 tell you why H&H was terminated? 9 MR. GRAHAM: Objection; assumes facts. 10 THE WITNESS: I believe there was an 11 explanation given, but I don't recall what it was. 12 Q. (BY MR. HAMAN) Okay. I'm going to have 13 you turn to Plaintiff's Exhibit 105. 14 MR. ANDERSON: Date? 15 MR. HAMAN: That's the contract with the POA 16 dated March 12th, 2010. 17 MR. ANDERSON: I've got it. Thank you. 18 Q. (BY MR. HAMAN) With regard to 19 paragraph 3.3 on the first page -- 20 A. Yes, sir. 21 Q. -- do you believe that First Rate fully 22 complied with the obligations imposed upon 23 First Rate as set forth in that paragraph with 24 regard to Sagecrest? 25 A. Yes, sir. 317</p> <p>[Page 317]</p>	<p>1 have said that it's changed in your mind. 2 What I'm thinking you're saying is that 3 Mr. Kalsbeek changed the terms of this by telling 4 you and First Rate that, "When it comes to water 5 heaters, I'm taking over." 6 Is that fair? 7 A. Yes, sir. 8 Q. So that's how -- one of the ways it 9 changed? 10 A. Yes, sir. 11 Q. Okay. The same with carbon monoxide 12 detectors and their installation or lack thereof? 13 A. Yes, sir. 14 Q. Because those were global issues, 15 correct? 16 A. Yes, sir. 17 Q. I mean, you made it clear yesterday if 18 it's a dishwasher in 4611 and that's it, Kalsbeek 19 is not going to really get involved in that. 20 You're going to talk to the tenant and figure out 21 what the problem is, and if it's a -- if it's a 22 certain cost, you may or may not inform the owner 23 and you'll fix it? 24 A. Yes, sir. 25 Q. But if it's a global issue and every 319</p> <p>[Page 319]</p>
<p>1 Q. You talked yesterday and then again this 2 morning about the original intent of this contract 3 was to deal with the common areas of the 4 association, among other things, correct? 5 MR. ANDERSON: Speaks for itself, calls for 6 a legal conclusion. 7 MR. HAMAN: I'm asking if that's what he's 8 testified to. 9 THE WITNESS: Yes, sir. 10 Q. (BY MR. HAMAN) But that changed, in 11 your mind, correct? 12 A. It changed. 13 Q. Did it change, in your mind, with regard 14 to management of the situation regarding the water 15 heaters at Sagecrest? 16 A. I can't recall if that was the time of 17 the change, but that was certainly a time of 18 change. 19 Q. Okay. And aside from the time of the 20 change, is that one of the ways in which it changed 21 in your mind? 22 In other words, what I'm getting at, 23 Mr. Drost, is that you have testified that the 24 original intent, among other things, of this 25 contract was to deal with the common areas, but you 318</p> <p>[Page 318]</p>	<p>1 dishwasher is going down in every apartment, then 2 Kalsbeek is going to get involved and he's going to 3 direct what you do, right? 4 A. If there's a trend, yes. 5 Q. So when it comes to global issues, this 6 contract changed such that Jon Kalsbeek directed 7 First Rate's activities? 8 A. Yes, sir. 9 Q. Whether it was a common area or not, 10 correct? 11 A. Yes, sir. 12 Q. Nothing in writing to that effect, is 13 there; in other words, an amendment to this 14 contract? 15 Let me strike that and I'll back up. 16 Is there any written amendments to this 17 contract that you're aware of? 18 A. There are e-mails instructing First Rate 19 Property Management to do certain functions and -- 20 and examples that you've given and others. 21 Q. Okay. And you took those e-mails to 22 mean amendments to this contract? 23 A. We were to perform as instructed. 24 Q. By -- 25 A. Jon Kalsbeek. 320</p> <p>[Page 320]</p>

[86] (Pages 317 to 320)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 15th day of April, 2014.

ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.

My Commission Expires: 2-14-17

7

From: 'Tony' <tony@frpmrentals.com>
To: Lizz Loop<Lizz@FRPMrentals.com>
Sent: Tuesday, November 13, 2012 5:57 AM
Attachments: Link Icons_html_72ad20b3.jpg;apartment.jpg;Link Icons_html_25eccabf.png;Link icons_html_m2670cc88.png;Link icons_html_m3ae067bc.png;Link icons_html_1b709ed.png
Subject: Fwd: Lease breaks

Can I get answers to these questions.

Sent from my iPhone

Begin forwarded message:

From: David Meisner <dbmeisner@gmail.com>
Date: November 13, 2012, 5:48:53 AM MST
To: Tony <tony@frpmrentals.com>
Subject: Re: Lease breaks

I'll talk to Jon on this matter. I think it is important the owners know what has happened and what we know at this time; so, they can make a decision on what to do.

I'm wondering these questions:

1. Did 4624 have a turnover since the new procedures?
2. Was there a battery operated carbon monoxide detector or wired carbon monoxide detector in the unit? If one existed, did it fail?
2. Was it the original AO Smith Water Heater?
3. Do we have any documentation that AO Smith refused to replace the original water heaters?
4. Can we (or Express Plumbing) contact AO Smith them about replacing the water heaters with recent events?
5. Do we want to consider using an electric water heater?

-David

On Mon, Nov 12, 2012 at 10:12 PM, Tony <tony@frpmrentals.com> wrote:

David

See below. Do you see some of my frustration. In our meeting today when I asked how he would like us to handle these requests. His response was why ask me, this is not a POA issue. Do what you normally would do. Then I explain how he has insisted that I run any global issue through him and cited a couple incidents where we were reprimanded for contacting owner directly and before going through him. Finally we were told to follow our procedures as this is a leasing issue. Then I get this email. This is the kind of issues we continually have. We are told one thing and then another.

The owners out there love us. We just have communication issues with Jon and it just causes confusion. I just don't know what to do and I don't know if we are

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headed in the right direction.

I too have the same sentiments for you and the other owners. And I know that we are all experiencing the same emotions and concerns.

Sent from my iPad

Begin forwarded message:

From: Commerce Centre <ccbusinesspark@gmail.com>
Date: November 12, 2012 8:23:12 PM MST
To: tony <tony@frpmrentals.com>, Lizz <Lizz@frpmrentals.com>
Subject: Re: Lease breaks

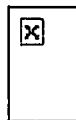
Thank you for meeting tonight and am working on responses to the issues raised. Please wait for a reply on directions to take regarding the issues. Will have something tomorrow, thanks.

Virginia and Jon

On Mon, Nov 12, 2012 at 12:42 PM, tony <tony@frpmrentals.com> wrote:

I would call each individual owner. I really want to get permission on notification to the owners and recommendations on corrective action.

Thanks



----- Original Message -----

From: "Lizz" <lizz@frpmrentals.com>
To: "Drost, RMP,MPM, Tony" <Tony@frpmrentals.com>; "Kalsbeek, Jon and Virginia" <ccbusinesspark@gmail.com>
Sent: 11/12/2012 12:40:28 PM
Subject: Lease breaks

We have received messages stating people are moving due to the situation. It is a mother and apparently other family members living in the same complex. I am not sure what to tell them. They have the right to break their lease but there are consequences and I am assuming they are still responsible for 30 days notice and the normal penalties.

The tenant that is renting the unit is in the process of moving. I have talked to the owner and he is aware and

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)
HYMAS, individually and as)
the natural parents of)
PRIVATE FIRST CLASS McQUEN C.)
FORBUSH, USMC (Deceased),)
and BREANNA HALOWELL,)

Plaintiffs,)

vs.)

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY)
OWNERS' ASSOCIATION, INC., an)
Idaho non-profit corporation,)
d/b/a SAGECREST MULTIFAMILY)
PROPERTY OWNERS' ASSOCIATION,)
et al.,)

Defendants.)

DEPOSITION OF SHEILA THOMASON

March 26 and 27, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

<p>1 It says, "The water heaters listed at 2 your properties are allowing carbon monoxide into 3 the apartments at dangerous levels that potentially 4 could cause death to your tenants." 5 Is that what it says? 6 A. Yes. 7 Q. What was your basis for concluding that? 8 A. My basis was that according to the 9 e-mail, it shows that there were over 4,000 parts 10 per million of carbon monoxide in the unit. 11 And down at the bottom of 1946, if you 12 follow the guidelines, according to this it shows 13 that it could cause headache, dizziness, and nausea 14 within 5 to 10 minutes, death within 30 minutes. 15 Q. Okay. Now, it references some testing 16 on page 1947, test results. 17 Is that correct? 18 A. Yes. 19 Q. Who did the testing and when was the 20 testing conducted? 21 Do you remember? 22 A. It appears, according to the e-mail, 23 that the testing was done around July 29th, and 24 this was testing that was done by Express Plumbing 25 and possibly Intermountain Gas on some of these</p> <p>[Page 23]</p>	<p>1 A. I believe the note that I posted with 2 the carbon monoxide detector suggested opening your 3 windows. This is in July, so it's nice outside. 4 You can crack your windows if you're going to run 5 your -- 6 I don't recall. I'd have to see the -- 7 the notice that I sent to the tenants. But it had 8 a couple of tips in there to -- for air flow 9 purposes. 10 Q. Okay. I have a notice -- and we'll get 11 to this. I have a notice that I believe was sent 12 in March of 2012, and I'll let you see that and 13 we'll compare and see if the notice is similar to 14 the one you sent then. 15 A. Okay. 16 Q. On the last page, 1948, it says, "I will 17 need a written response from each of you for 18 documentation purposes." 19 What did that mean? 20 A. Typically, if we're going to replace a 21 water heater or spend a significant amount of an 22 owner's money, we like to have acknowledgment from 23 them approving the -- the money that we're 24 spending. 25 Q. Okay. Did you get a response from</p> <p>[Page 25]</p>
<p>1 units, from what I could see. 2 Q. Were you involved with the testing at 3 all? 4 A. This was the testing -- this appears to 5 be the testing that we did with Intermountain Gas. 6 Q. Okay. It says on page 1947 in the 7 middle paragraph, "We are working on long-term 8 solutions so the same problem doesn't happen in 9 another five years." 10 What were the long-term solutions you 11 were working on in July of 2011? 12 A. I had asked the -- Express Plumbing to 13 see if they could find a water heater that wouldn't 14 have the same issues as the current water heaters. 15 Q. The bottom of the page, it says, "We 16 will be contacting all of the tenants in danger 17 letting them know we have requested the water 18 heater to be replaced. I will provide them with 19 safety precautions." 20 What safety precautions did you provide 21 to them? 22 A. Carbon monoxide detectors. 23 Q. Well, it says, "Provide them with safety 24 precautions and a carbon monoxide detector," so 25 I'm --</p> <p>[Page 24]</p>	<p>1 Mr. Meisner? 2 A. Yes. Looks like it on the e-mail. It 3 shows that he was having it replaced -- 4 Q. Okay. 5 A. -- on this 1944. 6 Q. Let's go to 1945, which is the second 7 page of the document. 8 Mr. Meisner states, "I'm wondering if 9 the measurement was taken correctly," and then your 10 response is, "They came back out on the first 11 couple of high ones we had because we thought we 12 were doing something wrong as well." 13 MR. HOWELL: Well, I'm just going to object 14 to the extent that you're saying that's what 15 Mr. Meisner said. He said a lot more than that. 16 But if you want to clarify that you're paraphrasing 17 what he said, that's fine. 18 MR. CLARK: For the record, I was 19 paraphrasing what Mr. Meisner had said. 20 Q. (BY MR. CLARK) I'm referring to your 21 response in the middle of -- or the upper third of 22 1945. 23 A. What was the question? 24 MR. CLARK: Did I ask a question? 25 THE WITNESS: I don't recall you asking a</p> <p>[Page 26]</p>

[11] (Pages 23 to 26)

1 MR. CLARK: 90?
 2 THE REPORTER: Yes.
 3 Q. (BY MR. CLARK) Sheila, I've had you
 4 handed what has been marked Exhibit No. 90.
 5 Would you take a minute and read through
 6 that.
 7 A. Okay.
 8 Q. I'm focusing on this e-mail that begins
 9 about a quarter of the way down, beginning with
 10 "Commerce Centre."
 11 Who is Commerce Centre?
 12 A. I don't -- I don't recall.
 13 Q. It's not Mr. Kalsbeek?
 14 A. It could be.
 15 Q. Okay.
 16 A. It wasn't the e-mail that I -- I recall
 17 for Mr. Kalsbeek, but I don't know.
 18 Q. Okay.
 19 A. It looks like it's from him.
 20 Q. Your e-mail begins below "Virginia and
 21 Jon."
 22 Is that accurate?
 23 A. Yes.
 24 Q. It says, "Attached is the paperwork Jon
 25 brought in regarding carbon monoxide."

[Page 51]

1 Do you have a recollection of a meeting
 2 with Mr. Kalsbeek to discuss carbon monoxide?
 3 A. Vaguely, yes.
 4 Q. In March sometime --
 5 A. Yes.
 6 Q. -- 2012?
 7 Who was at the meeting, if you recall?
 8 A. I recall myself; Lizz Loop; Jon
 9 Kalsbeek; Virginia, his wife; I believe Tara. I'm
 10 not a hundred percent on Tara.
 11 Q. Do you recall whether or not
 12 Mr. Kalsbeek was audio recording this meeting?
 13 A. That one, I don't know.
 14 Q. Do you recall having been at any other
 15 meetings where Mr. Kalsbeek was audio recording?
 16 A. No.
 17 Q. Do you know whether Mr. Kalsbeek was
 18 audio recording phone calls with you?
 19 A. I don't know.
 20 Q. Okay. Then it goes on, "Below is what I
 21 have for the procedures."
 22 Is that correct? Is that what it says?
 23 A. Yeah, that's what it says.
 24 Q. Where did you get the information that
 25 caused you to generate these procedures?

[Page 52]

1 A. This was Jon's way.
 2 MR. HOWELL: I'm sorry?
 3 THE WITNESS: Jon -- this is from Jon. This
 4 is the way Jon wanted to have the testing and the
 5 maintenance done.
 6 Q. (BY MR. CLARK) So is it fair to
 7 categorize this as your interpretation of what he's
 8 provided you?
 9 A. Yes.
 10 Q. What information he's provided you?
 11 A. Yes.
 12 Q. Okay. And did you believe that the
 13 testing procedures were different than what
 14 Intermountain Gas had instructed you to -- how
 15 Intermountain Gas had instructed you to test?
 16 A. Yes. I don't recall doing any air tests
 17 in the room, but --
 18 Q. It says, "Cc to Lizz."
 19 Is that Lizz Loop?
 20 A. Yes.
 21 Q. And Tony Drost?
 22 A. Yeah.
 23 Q. Okay. Did you ever have a conversation
 24 with Mr. Drost about these procedures, carbon
 25 monoxide procedures?

[Page 53]

1 A. I don't recall.
 2 Q. Did Mr. Drost voice any concerns about
 3 the procedures to you?
 4 A. Not that I can recall.
 5 Q. Okay. Now we're in March 2012.
 6 If I remember correctly, your testimony
 7 was that you were the maintenance supervisor for
 8 First Rate Property Management, but you weren't
 9 actually stationed at Sagecrest.
 10 Is that correct?
 11 A. Correct.
 12 Q. Why are you still involved in meetings
 13 regarding carbon monoxide at Sagecrest?
 14 A. I -- I believe Jon and Tara and Lizz
 15 requested it because I was the maintenance
 16 supervisor.
 17 MR. CLARK: You want to take a break?
 18 MR. ANDERSON: Sure.
 19 (Break taken from 10:41 a.m. to 10:58 a.m.)
 20 Q. (BY MR. CLARK) Sheila, I'm going to hand
 21 you what has been previously marked as Exhibit 53.
 22 Have you seen that document before?
 23 A. It doesn't look familiar. I -- I don't
 24 know.
 25 Q. Did you ever see a --

[Page 54]

[18] (Pages 51 to 54)

<p>1 Q. Did you specifically have any meetings 2 with Mr. Drost about carbon monoxide at Sagecrest? 3 A. No, not that I recall. 4 Q. Was Mr. Drost ever present with -- 5 during any meetings with you that you were involved 6 where carbon monoxide was discussed? 7 A. Not that I recall. 8 Q. Who is Mr. Kalsbeek, Jon Kalsbeek? 9 A. He was the POA president of Sagecrest. 10 Q. Okay. 11 A. And also an individual owner of -- I 12 don't know how many buildings; a couple buildings 13 at Sagecrest. 14 Q. What was your relationship with 15 Mr. Kalsbeek? 16 MR. ANDERSON: In what context? 17 MR. CLARK: Well, there's -- 18 THE WITNESS: How did I personally feel 19 about him or how did -- 20 What? 21 Q. (BY MR. CLARK) Well -- 22 A. I reported to him for anything that 23 happened at Sagecrest during the time that I was 24 there or anytime I was involved with Sagecrest. 25 Q. You say you reported to him. That</p> <p style="text-align: right;">[Page 63]</p>	<p>1 Q. Did Mr. Kalsbeek tell you during this 2 meeting that he had met with or had any discussions 3 with Intermountain Gas? 4 A. I don't recall. 5 Q. Did you report to Mr. Drost after this 6 meeting? 7 A. I don't recall. 8 Well, actually, according to the e-mail 9 on Exhibit 90, it shows that I copied him. So if 10 you consider that a report, I -- 11 I didn't really report to Tony Drost on 12 my daily actions. 13 Q. Did you report to Lizz? 14 A. Regarding my -- 15 Not really on my daily actions. Just 16 copied her on e-mails as well. 17 Q. Okay. You said you had some personal 18 feelings about Mr. Kalsbeek. 19 What were your personal feelings? 20 A. I don't like his mustache. You know -- 21 Q. Did you like -- 22 MR. ANDERSON: Can the record reflect I 23 think she was being facetious. 24 THE WITNESS: I was. I apologize. 25 Q. (BY MR. CLARK) Did you like the way that</p> <p style="text-align: right;">[Page 65]</p>
<p>1 sounds like a formal type of relationship. 2 How do you mean you reported to him? 3 A. I made him aware of what was going on at 4 the complex usually via e-mail. 5 Q. Okay. Were there any specific meetings 6 that you had with Mr. Kalsbeek related to carbon 7 monoxide? 8 A. Yes. 9 Q. Do you recall when those were? 10 A. According to this e-mail on Exhibit 90, 11 it says, "Good meeting. Thanks," and that was 12 dated March 22nd, 2012. 13 So I would say give or take a day before 14 March 22nd, 2012. 15 Q. Do you recall where the meeting was? 16 A. It was held at Sagecrest. 17 Q. Do you remember who was there? 18 A. You already asked me this. I believe it 19 was Lizz, myself, Jon, Virginia. I don't recall if 20 Tara was there. I can't remember if she was there. 21 Q. If you recall, was there a discussion 22 about the testing procedures? 23 A. Yes. That's what originated the draft 24 of -- what does it say? The working up the draft 25 and details on Exhibit 90.</p> <p style="text-align: right;">[Page 64]</p>	<p>1 he treated you? 2 MR. HOWELL: I -- I -- 3 Go ahead. It's all right. 4 THE WITNESS: No. 5 Q. (BY MR. CLARK) Could you give me an 6 example of the way he would treat you? 7 A. He just made it difficult for me to do 8 my job, I felt. 9 Q. Okay. Can you give me an example of 10 that? 11 A. He micromanaged things that I did on a 12 daily basis while I was at Sagecrest that made my 13 job a little bit more difficult. I'd have to 14 include him on the e-mails or report to him on 15 daily things that happened. So it -- 16 Things took a lot longer to do just in 17 general. 18 Q. Did you ever have a communication with 19 Mr. Drost about Mr. Kalsbeek? 20 A. I'm -- 21 Yeah, I'm sure I have. 22 Q. Did you ask Mr. Drost to intercede and 23 get Kalsbeek off your back, so to speak? 24 A. I don't recall doing that, no. 25 Q. Did Tara ever tell you she was</p> <p style="text-align: right;">[Page 66]</p>

[21] (Pages 63 to 66)

<p>1 she's not a licensed anything to do any type of 2 testing is how she -- how I recall her expressing 3 that to me.</p> <p>4 Q. Do you know if Tara did any -- 5 I think you testified that Tara did -- 6 she was trained by Intermountain Gas, is that 7 right, to do the testing? 8 A. I don't recall if she was there during 9 Intermountain Gas. She could have been trained by 10 Express Plumbing. 11 I don't know. I really don't know, 12 actually. 13 Q. Okay. You testified about preventative 14 maintenance at the complex. 15 A. (Witness indicates.) 16 Q. At the time you were there, were there 17 set procedures for these -- for the maintenance? 18 A. I believe there was something set up. I 19 don't know what they were off the top of my head. 20 Q. Okay. Were these procedures -- 21 Do you know, how often were these 22 procedures done? 23 A. I don't recall. 24 Q. Can you tell me, do you recall if they 25 were done once a year, twice a year?</p> <p style="text-align: right;">[Page 75]</p>	<p>1 received his approval, that's hard -- I -- I don't 2 recall.</p> <p>3 He was informed on every maintenance 4 issue that happened at Sagecrest inside or outside 5 the building on a daily basis. 6 Q. Okay. Are you aware that First Rate had 7 a contract with the individual owners of the units? 8 A. Yes. 9 Q. Have you ever looked at those contracts? 10 A. It's been a while, yes. 11 Q. Do you recall generally what they -- 12 what First Rate contracted with the individual 13 owners regarding? 14 A. I'm going to say no. I don't know if -- 15 if that specific building or -- you know, if that 16 complex had different individual ones than the 17 standard management agreement. I don't know 18 because there was a POA involved and it was the 19 only POA complex that we managed. 20 So there may be different contracts for 21 that -- those individual owners. I don't know. 22 Q. Okay. And are you aware that First Rate 23 had a separate contract with the POA? 24 A. Yes. 25 Q. Did you ever look at that contract?</p> <p style="text-align: right;">[Page 77]</p>
<p>1 A. I don't know. I -- I didn't coordinate 2 the preventative maintenance or much maintenance at 3 Sagecrest. 4 Q. Oh, okay. I'm sorry. I thought you 5 testified that you did coordinate the preventative 6 maintenance at Sagecrest. 7 A. Not at Sagecrest, no. 8 Q. Okay. As part of your position at 9 First Rate, you dealt with the POA on certain 10 issues? 11 A. Yes. 12 Q. What type of issues? 13 A. It -- 14 Regarding POA, do you mean Jon? 15 Q. Both, either. 16 A. Any issue that had to do with Sagecrest, 17 I dealt with Jon. 18 Q. So would you deal with Jon if a 19 dishwasher needed to be replaced in a unit? 20 A. Jon knew about it before anything was 21 done. 22 Q. For every single unit there, you would 23 talk to Jon before replacing a dishwasher in a unit 24 that wasn't his? 25 A. He was informed. Whether or not I</p> <p style="text-align: right;">[Page 76]</p>	<p>1 A. No. 2 Q. Okay. Would you have to get the 3 board's -- 4 Well, let me ask you this: Did you deal 5 with anyone else on the board other than Jon 6 Kalsbeek -- 7 A. I -- 8 Q. -- regarding POA issues? 9 A. I don't know who was on the board. 10 Q. So it was fair to say you dealt with 11 Jon -- 12 A. Yes. 13 Q. -- regarding POA issues? Okay. 14 Would you need Jon's approval to go in 15 and -- 16 Say a dishwasher needed to be replaced 17 in a different owner's unit. Would you need his 18 approval? 19 A. Maybe not his approval, but he had to be 20 made aware. 21 Q. Can you tell me why he needed to be made 22 aware? 23 A. That's what Jon wanted. 24 Q. Do you know why? Did he ever tell you? 25 A. No.</p> <p style="text-align: right;">[Page 78]</p>

[24] (Pages 75 to 78)

<p>1 Q. You were talking about the CO testing 2 procedures, that you had a meeting with Jon and 3 Lizz, possibly Tara, I think you said Virginia was 4 there in March of 2012. 5 A. (Witness indicates.) 6 Q. Do you recall how this meeting got set 7 up? 8 A. I don't. 9 Q. And you don't recall -- 10 Or let me ask: Do you recall any of the 11 conversations in that meeting? 12 A. I'm -- I'm going to say no. I -- I'm 13 sure I can recall bits and pieces, but not really 14 enough to -- I wouldn't feel comfortable putting it 15 together, you know. 16 Q. Okay. Would you look at Exhibit 90 17 again. 18 A. Okay. 19 Q. In this part that is the e-mail from 20 you, it states, "Attached is the paperwork Jon 21 brought in regarding carbon monoxide. Below is 22 what I have for the procedures." 23 Do you recall what part you played in 24 putting these procedures together? 25 A. I recall taking notes during the meeting</p> <p style="text-align: right;">[Page 79]</p>	<p>1 Kalsbeek's response is dated March 22nd. 2 So I probably misspoke earlier when I 3 said this is from the same chain -- 4 MR. HOWELL: Correct. 5 MR. ANDERSON: -- of e-mails, so I 6 apologize. 7 Q. (BY MR. STACEY) On this it says that -- 8 in your e-mail, "Attached is the paper Jon brought 9 in regarding carbon monoxide," and then on the next 10 page it shows that there's a couple of attachments. 11 A. Yeah, yes. 12 Q. And do you recall what that would have 13 been? 14 A. No. 15 Q. Okay. On the first part of this where 16 Jon is forwarding this on, if you look at the 17 second paragraph there, in the last sentence it 18 says, "These procedures were worked out with the 19 on-site managers, the maintenance supervisor, and 20 Virginia and I." 21 A. Uh-huh, yes. 22 Q. So are you testifying that basically 23 these procedures were created by Jon? 24 A. Yes. 25 Q. And the on-site managers, I guess that</p> <p style="text-align: right;">[Page 81]</p>
<p>1 that was held at Sagecrest of what Jon wanted done 2 for procedures for the testing. 3 Q. Okay. Did anyone else have any input 4 into these procedures? 5 A. I would just say myself and Jon. 6 Q. How much input did you have into the 7 procedures? 8 A. I feel very little. 9 Q. Do you recall what parts you might have 10 had input into? 11 A. No. 12 Q. Would you look at Exhibit 74. 13 Do you have a copy of that? 14 MR. ANDERSON: This is the first -- 15 This is the one you've looked at. Puts 16 it in context. 17 THE WITNESS: Oh, oh. 18 Okay. 19 Q. (BY MR. STACEY) So this looks to be the 20 same thing as Exhibit 90 but with -- this is 21 forwarded on apparently from Jon to a few 22 different -- a few other people. 23 A. Yes. 24 MR. ANDERSON: Counsel, I just noticed that 25 it's also dated March 21st, and 90 is -- Jon</p> <p style="text-align: right;">[Page 80]</p>	<p>1 would be Tara and Missy? 2 A. Yes. 3 Q. And you're the maintenance supervisor? 4 A. Yes. 5 Q. You guys had very little input into 6 this? 7 A. Yes. Personally, that's how I feel, 8 yes. 9 Q. Okay. And after these procedures were 10 worked out, do you know if they were followed by 11 First Rate? 12 A. I don't know. 13 Q. If you look at the part of the e-mail 14 that you -- that you put together, on the bottom of 15 that it talks about, "Carbon monoxide fire detector 16 combos are eventually to be installed in every unit 17 to replace the smoke detectors in the hallway. 18 This will be done on turnovers, during preventative 19 maintenance, lease renewals, or if smoke detector 20 is faulty in unit until each one has one." 21 Do you know if combo detectors were put 22 in during preventative maintenance? 23 A. Yes. 24 Q. Okay. Do you know if they were put in 25 during lease renewals?</p> <p style="text-align: right;">[Page 82]</p>

[25] (Pages 79 to 82)

<p>1 Q. Were those in person or on the 2 telephone? 3 A. I don't recall. 4 Q. Okay. Do you recall the content of 5 those discussions? 6 A. Some of the content. 7 Q. Okay. What was it? 8 A. Just the discussion of his findings in 9 the letter and possible solutions. 10 Q. Okay. Do you know, did Exhibit 42 go to 11 any of the individual owners at Sagecrest? 12 A. Yes. 13 Q. How do you know that? 14 A. I recall e-mailing the information to 15 the owners. I believe I sent it to the ones that 16 had high carbon monoxide results. 17 Q. Okay. And as you sit here today, do you 18 recall how you defined "high carbon monoxide 19 results"? 20 A. I don't recall. 21 Q. Okay. Did you make the decision on what 22 was high and what owners would receive Exhibit 42? 23 A. No. 24 Q. Who made that decision? 25 A. It was kind of a group effort. It was</p> <p style="text-align: right;">[Page 139]</p>	<p>1 A. No. 2 Q. Was it on the phone or in person? 3 A. On the phone. 4 Q. What was Jon's response when you said 5 that you wanted to send Exhibit 42 to every single 6 owner? 7 A. He said, "Absolutely not." 8 Q. Did he say why? Did you ask him why? 9 A. He wanted to be the one in charge of 10 distributing this type of information to the 11 individual -- individual owners at Sagecrest. 12 Q. And what was your response? 13 A. "Whatever." 14 Q. Okay. And this would be a good example, 15 and there's probably some others, but did you ever 16 call up Lizz or Tony and say, "You know, Jon just 17 wants to send this to these few owners, and I 18 disagree with that. It should be sent to everyone. 19 Please help me"? 20 I mean, did you ever express your 21 concern to Lizz or Tony about that? 22 A. On this specific issue, I don't recall. 23 Q. And by that, are you saying that you 24 might have done it but you just don't remember or 25 that you didn't do it?</p> <p style="text-align: right;">[Page 141]</p>
<p>1 difficult because the more -- 2 And I say "group" meaning myself, Ben 3 Davis. I don't know if Tara was in town at that 4 point. We all figured, "Who are we to decide," you 5 know? 6 So I believe we did it based off of the 7 carbon monoxide information that showed the results 8 of what would happen if you had exposure to high 9 carbon monoxide at different parts per million. 10 Q. Okay. Do you know, did Exhibit 42 go to 11 Mr. Switzer? 12 A. I don't know. 13 Q. Do you think you should have sent 14 Exhibit 42 to Mr. Switzer? 15 MR. ANDERSON: Object to the form. 16 THE WITNESS: I wanted to send the 17 information to every single owner at Sagecrest. 18 Q. (BY MR. PALMER) Did you tell Jon that, 19 Jon Kalsbeek? 20 A. Yes, I did. 21 Q. Did you do that in an e-mail or a verbal 22 communication? 23 A. Verbal communication. 24 Q. Was there anyone else present during 25 that verbal communication?</p> <p style="text-align: right;">[Page 140]</p>	<p>1 A. I might have done it. It was done on 2 several issues. I don't know if this was one 3 specific issue. 4 Q. Okay. So your testimony is that you do 5 recall going to Lizz and/or Tony and saying, "I 6 need help with Jon. I really disagree with what 7 Jon is telling me what to do." 8 Is that right? 9 MR. ANDERSON: Object to the form; compound 10 question. 11 Q. (BY MR. PALMER) Is that right? 12 MR. ANDERSON: It's still a compound 13 question, even though -- 14 Q. (BY MR. PALMER) Is that right? 15 Go ahead. 16 MR. ANDERSON: Quit -- quit saying, "Is that 17 right?" Let me just -- 18 The question is objected to -- 19 MR. PALMER: Okay. 20 MR. ANDERSON: -- and you say something 21 else, and I have to object again. So let's just 22 keep it one question, one at a time. 23 MR. PALMER: I'm making sure she knows that 24 she has to answer. 25 MR. ANDERSON: I think she knows that. I</p> <p style="text-align: right;">[Page 142]</p>

[40] (Pages 139 to 142)

1 next page, it says, "If requested."
2 Do you see that?
3 A. Yeah. I don't understand why that would
4 be there. I don't --
5 Q. Because you just gave them CO detectors?
6 A. Yeah. Anyone --
7 It wasn't a request. It was something
8 we just did to all of them.
9 Q. Okay. I think your testimony previously
10 to Mr. Palmer was that you did follow up with phone
11 calls from people that you didn't hear back from?
12 A. Yes.
13 Q. Did you have a list or keep a list of
14 who you did hear from and who you did not?
15 A. Yes.
16 Q. Is that something that --
17 A. No.
18 Q. Was it a note or something?
19 A. I'm guessing it was just a pad of paper
20 that had the list of buildings, and we checkmarked
21 them off as we heard back from different owners and
22 received approval.
23 Q. Okay. And then you also testified that
24 Exhibit 42, if you can look at that.
25 Do you have it?

[Page 191]

1 A. Yeah.
2 Q. Oh, I'm sorry.
3 A. Sorry.
4 Q. That's the notice, July 2011, that was
5 sent to the owners, right?
6 A. Yes.
7 Q. And you need to help me out because I
8 think I misheard you.
9 Do you know whether this was sent out to
10 all owners?
11 A. I -- I do not know.
12 Q. Okay. You know it was sent to some
13 owners, the ones that had high readings in their
14 units, correct?
15 A. Correct.
16 Q. And that's what I heard you say, that
17 you don't know if it was also sent to all owners.
18 It may have been?
19 MR. ANDERSON: Form; misstates her
20 testimony.
21 THE WITNESS: It was not sent out at the
22 same --
23 All owners were not included on the
24 original e-mail that I sent out with the issues.
25 Whether this was sent out at a later date to all

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1 owners, I do not know.
2 Q. (BY MR. HOWELL) Would you have sent that
3 out to all owners at a later date?
4 A. No. That would -- that would have --
5 Jon would have had to approve that.
6 Q. Okay. I mean, First Rate had --
7 Are you aware that First Rate had
8 contracts with the individual owners?
9 A. Yes.
10 Q. And within those contracts --
11 Are you familiar with the contract that
12 First Rate had with the individual owners?
13 A. Vaguely, but I --
14 MR. ANDERSON: At Sagecrest?
15 MR. HOWELL: Yeah.
16 THE WITNESS: I don't think I reviewed the
17 individual owners' contracts at Sagecrest.
18 Q. (BY MR. HOWELL) Okay. Is that something
19 that you would concern yourself with, the details
20 of the contract with the individual owners?
21 MR. ANDERSON: Again, at Sagecrest?
22 MR. HOWELL: Yes.
23 MR. ANDERSON: Thank you.
24 THE WITNESS: No.
25 Q. (BY MR. HOWELL) Okay. Following up on

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1 something you said earlier also, that Jon -- I
2 think you said Jon prevented you from sending out
3 Exhibit 42 to all owners.
4 A. Yes.
5 Q. How did he do that?
6 A. We had a phone discussion after I sent
7 out the original e-mail, and he was extremely
8 dissatisfied and upset with me that I sent that out
9 to the owners; that I sent it, too, without him
10 reviewing it first.
11 Q. Okay. What else do you recall about
12 that conversation, if anything?
13 A. I just recall that he wanted to review
14 anything that I sent out to the owners before I
15 sent anything like this --
16 Q. Okay.
17 A. -- out to them.
18 Q. Did you have --
19 A. And --
20 Q. -- a discussion whether it should be
21 sent to the rest of the ownership?
22 A. At that time, I don't recall if that was
23 when it was discussed.
24 Q. Did you ever discuss with Mr. Kalsbeek
25 at a subsequent time whether Exhibit 42 should be

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[53] (Pages 191 to 194)

<p>1 sent to all of the ownership at Sagecrest?</p> <p>2 A. At some point in time, I did have a</p> <p>3 discussion with him that all the owners at</p> <p>4 Sagecrest should read this and be aware of the</p> <p>5 issues.</p> <p>6 Q. Okay. And do you know when that was?</p> <p>7 A. No, I don't recall.</p> <p>8 Q. Was there anything that prevented you</p> <p>9 from sending it to the entire ownership?</p> <p>10 A. Jon asked me not to.</p> <p>11 Q. Other than that, was there anything else</p> <p>12 that prevented you from sending it to the entire</p> <p>13 ownership?</p> <p>14 A. No.</p> <p>15 Q. Did you talk to Mr. Drost about your</p> <p>16 conversation with Jon with respect to Exhibit 42?</p> <p>17 A. I don't recall.</p> <p>18 Q. Did you talk to Ms. Loop?</p> <p>19 A. I don't recall.</p> <p>20 Q. Jumping around here, in September of</p> <p>21 2012, you left the employment of First Rate and</p> <p>22 went to Express, correct?</p> <p>23 A. Correct.</p> <p>24 Q. And I think you testified it's because</p> <p>25 you wanted a more stable type of job or a --</p> <p style="text-align: right;">[Page 195]</p>	<p>1 Mr. Forbush had passed away.</p> <p>2 Q. Okay. You said you don't recall the</p> <p>3 details?</p> <p>4 A. No.</p> <p>5 Q. Can you give us an idea what it would</p> <p>6 have been about at all?</p> <p>7 A. Just that it was extremely unfortunate</p> <p>8 and we wish more could have been done to prevent</p> <p>9 that from happening.</p> <p>10 Q. Okay. Anything else that you recall</p> <p>11 about those conversations?</p> <p>12 A. No.</p> <p>13 Q. Did anybody ever ask you to look for</p> <p>14 documents from Express Plumbing that were -- that</p> <p>15 might be related to Sagecrest or any of these</p> <p>16 issues?</p> <p>17 A. Yes.</p> <p>18 Q. Can you explain that?</p> <p>19 A. Eric came into our office and asked for</p> <p>20 documents of invoices that we had for Sagecrest for</p> <p>21 any time that we went out to Sagecrest. We</p> <p>22 provided all of those invoices and any</p> <p>23 documentation that we had.</p> <p>24 Q. Did you talk to Mr. Clark?</p> <p>25 A. Yes.</p> <p style="text-align: right;">[Page 197]</p>
<p>1 timing-wise?</p> <p>2 A. A 9:00 to 5:00, yes.</p> <p>3 Q. And you were the receptionist at</p> <p>4 Express?</p> <p>5 A. I think I was technically the office</p> <p>6 manager was my -- was my -- my professional title.</p> <p>7 Q. Okay. And you worked there for about a</p> <p>8 year?</p> <p>9 A. Yes.</p> <p>10 Q. What else did you do --</p> <p>11 Well, I mean, now that you say "office</p> <p>12 manager," what were your duties and roles at</p> <p>13 Express Plumbing?</p> <p>14 A. I answered the phones, I did invoicing,</p> <p>15 I dispatched the technicians out to different jobs,</p> <p>16 I went to Costco for office supplies. Just</p> <p>17 general --</p> <p>18 Q. Did you have any discussions with</p> <p>19 anybody at Express Plumbing with respect to the CO</p> <p>20 issues at Sagecrest while you were employed there?</p> <p>21 A. Yes.</p> <p>22 Q. Can you explain those?</p> <p>23 A. I know that I discussed --</p> <p>24 Ben and I had conversations. I don't</p> <p>25 know the details of -- once we found out that</p> <p style="text-align: right;">[Page 196]</p>	<p>1 Q. On how many occasions did you talk to</p> <p>2 Mr. Clark?</p> <p>3 A. Oh, I don't recall. A couple of times.</p> <p>4 Q. Okay. At the Express Plumbing office or</p> <p>5 somewhere else?</p> <p>6 A. At the Express Plumbing office, and we</p> <p>7 had brief conversations on the phone of getting</p> <p>8 documents or --</p> <p>9 I don't recall the details. Not --</p> <p>10 nothing of major content.</p> <p>11 Q. Okay. And in response to that request,</p> <p>12 you did what?</p> <p>13 A. I did go through all the boxes of</p> <p>14 invoices and pulled every invoice and made copies</p> <p>15 for any work that was done at Sagecrest.</p> <p>16 Q. Okay. Did you look for any documents</p> <p>17 other than just invoices?</p> <p>18 A. I don't believe so, no. No, I didn't.</p> <p>19 Q. Go through computers looking for e-mails</p> <p>20 or anything like that?</p> <p>21 A. No, because I had -- my computer didn't</p> <p>22 have any --</p> <p>23 I was a new employee, so I -- it was a</p> <p>24 new e-mail. I didn't have any documents or</p> <p>25 anything on my computer that I had.</p> <p style="text-align: right;">[Page 198]</p>

[54] (Pages 195 to 198)

1 A. Correct.
 2 Q. Were you aware during the time of your
 3 employment with First Rate that Matt Switzer had a
 4 contract with First Rate?
 5 A. Yes.
 6 MR. HAMAN: Madam Court Reporter, do you
 7 have Exhibit 54?
 8 THE REPORTER: We have it here, yes.
 9 MR. HAMAN: Can you show her Exhibit 54.
 10 THE WITNESS: Okay. I have it.
 11 Q. (BY MR. HAMAN) Ma'am, have you seen
 12 that document before?
 13 A. Not this specific document. It looks
 14 like a general management agreement.
 15 Q. Does it look like a management agreement
 16 that First Rate would have with specific owners?
 17 A. Yeah, it appears so.
 18 Q. Okay. And I'll represent to you that
 19 this is the actual management agreement between
 20 First Rate and Matt Switzer.
 21 I guess the question I have is: Why did
 22 you comply with Jon's request if First Rate was
 23 contracted to work for Matt Switzer?
 24 MR. ANDERSON: Form.
 25 THE WITNESS: Because Jon was in charge.

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1 That's who we reported everything to.
 2 Q. (BY MR. HAMAN) He was in charge of
 3 what?
 4 A. Decisions that were made at Sagecrest.
 5 Q. Who told you that?
 6 A. Jon.
 7 Q. So he led you to believe that he spoke
 8 on behalf of the owners?
 9 A. Absolutely.
 10 Q. On numerous occasions, he led you to
 11 believe this?
 12 A. Yes.
 13 Q. Did he ever tell you not to contact Matt
 14 Switzer?
 15 A. Not Matt Switzer directly, no.
 16 Q. He just told you not to communicate with
 17 the owners, correct?
 18 MR. HOWELL: Objection; form.
 19 THE WITNESS: He --
 20 Q. (BY MR. HAMAN) With regard to
 21 Exhibit 42. I'm sorry.
 22 A. He --
 23 Yes.
 24 Q. Have you ever met Matt Switzer?
 25 A. I don't think I've met with him

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1 personally, no.
 2 Q. Have you ever spoken on the telephone
 3 with Matt Switzer?
 4 A. Yes, I have.
 5 Q. More than once?
 6 A. Yes.
 7 Q. Did you ever speak with him on the
 8 telephone about concerns regarding carbon monoxide
 9 in Building 46?
 10 A. I don't recall.
 11 Q. Did you ever speak with him on the
 12 telephone with regard to issues pertaining to water
 13 heaters in Building 46?
 14 A. I don't recall.
 15 Q. What do you recall speaking with him on
 16 the phone about?
 17 A. I recall he had a flood, and I was
 18 helping him with an insurance claim. I believe
 19 it -- I believe at Building 46.
 20 Q. Would that have been in the early part
 21 of 2011, January of 2011?
 22 A. I don't recall.
 23 Q. Do you recall speaking with him in 2012
 24 at all?
 25 A. I don't recall.

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1 Q. Would that be noted in the daily log,
 2 that you spoke with an owner?
 3 A. I only wrote things in the daily log if
 4 I was physically at Sagecrest. I didn't write in
 5 the daily log when I spoke to them from the office
 6 at First Rate.
 7 Q. Okay. When you spoke with Mr. Switzer,
 8 would you have used a First Rate telephone or your
 9 personal phone?
 10 A. I usually used my First Rate cell phone.
 11 Q. Okay. When you say "usually," did
 12 you -- as you sit here today, do you recall ever
 13 using your personal cell phone to contact Matt
 14 Switzer?
 15 A. No.
 16 Q. So to the best of your recollection,
 17 your oral communications with Mr. Switzer regarded
 18 a flood that he had had in Building 46?
 19 A. Yes.
 20 Q. Do you recall any other communications
 21 with Matt Switzer?
 22 A. I recall another maintenance issue that
 23 he had. I don't -- I don't remember the details,
 24 but I believe it was kind of costly, and I think it
 25 was pretty -- pretty close to the time frame of the

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[60] (Pages 219 to 222)

<p>1 MR. ANDERSON: I don't. 2 MR. CLARK: I've just got a couple of 3 follow-ups unless you want to take a quick break. 4 MR. ANDERSON: Let's finish up. 5 MR. CLARK: Okay.</p> <p>6 7 FURTHER EXAMINATION 8 BY MR. CLARK: 9 Q. Mr. Palmer asked you about some 10 conversations with Tony about Jon Kalsbeek, and you 11 said -- and I'm just paraphrasing -- that you had 12 discussions about getting rid of Sagecrest and Jon. 13 Is that correct? 14 A. Correct. 15 Q. Could you give me an example of what 16 would cause you to go to Tony and have a discussion 17 about getting rid of Sagecrest and Jon? 18 A. Just the daily activities at his -- 19 He micromanaged everything that we did, 20 so it made everybody's job a little more difficult 21 having to report to him on everything that was done 22 and wait for decisions from him. 23 Q. Regarding Exhibit 53, you had responded 24 to some questions that you were not satisfied with 25 the criteria listed in the carbon monoxide</p> <p>[Page 259]</p>	<p>1 during this meeting? If I understand correctly, it 2 was in March of 2012. 3 A. Correct. 4 Q. And this document was created after the 5 meeting? 6 A. Yes. 7 Q. And disseminated? 8 A. Yes. 9 Q. Did you see the document after that -- 10 after the meeting, Exhibit 53? 11 A. I believe there's documents showing it 12 was sent to me in an e-mail. 13 Q. Okay. 14 A. Yeah. 15 Q. And you said you were not satisfied with 16 the criteria. 17 Is that correct? 18 A. Correct. 19 Q. And then my question is: Was that a 20 situation where you would go to Tony and say, "We 21 need to get rid of Sagecrest and Jon"? 22 MR. ANDERSON: Asked and answered. You just 23 asked her if she talked to Tony Drost about these 24 particular procedures. 25 THE WITNESS: I don't recall talking to Tony</p> <p>[Page 261]</p>
<p>1 procedures. 2 A. Yes. 3 Q. Is that correct? 4 A. Correct. 5 Q. Did you go to Mr. Drost and discuss with 6 Mr. Drost that you were not satisfied with those? 7 A. No, I did not. 8 Q. Was this one of the situations where you 9 felt that First Rate Property Management should get 10 rid of Sagecrest and Jon? 11 MR. ANDERSON: Form. 12 THE WITNESS: This is an example of one of 13 the reasons why. 14 Q. (BY MR. CLARK) Okay. And I'm asking 15 you: You had a meeting with Mr. Kalsbeek regarding 16 these carbon monoxide procedures, correct? 17 A. Correct. 18 Q. And you voiced your concern about these 19 procedures, correct? 20 A. These procedures were -- I believe were 21 revised after our meeting, so these procedures -- 22 These exact procedures were not 23 discussed at the meeting. The meeting is how these 24 procedures came about. 25 Q. Okay. Well, was there a discussion</p> <p>[Page 260]</p>	<p>1 about these procedures. 2 Q. (BY MR. CLARK) Okay. And I'm 3 paraphrasing again. You said you thought or wished 4 more could have been done to prevent Mr. Forbush's 5 death after a conversation with Mr. Davis at 6 Express Plumbing. 7 Is that correct? 8 A. Correct. 9 Q. What do you believe should have been 10 done or could have been done to prevent this? 11 A. Oh, I don't -- I don't know. I don't 12 know what the actual cause of death was. It was 13 just unfortunate. I -- 14 It would be nice if we could prevent 15 every death. 16 Q. Can you take a look at 95 for me. 17 Would you look at the lower part. It 18 says, "Here's a recap." And I apologize. I had 19 this exhibit yesterday. It wasn't a complete 20 exhibit, but I guess I didn't understand. 21 There's writing in bold under the, 22 "Here's a recap." 23 Why is there normal lettering and then 24 lettering in bold? 25 A. I don't -- I don't know.</p> <p>[Page 262]</p>

[70] (Pages 259 to 262)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)


I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:


That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 8th day of April 2014.


ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.



My Commission Expires: 2-14-17

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<p style="text-align: right;">1</p> <hr/> <p>REPORTER'S TRANSCRIPT</p> <hr/> <p>FILE NAME: SPOA2991</p> <p>Jon Kalsbeek;</p> <p>Sagecrest Clubhouse; 10/25/2012; 9:00 a.m.;</p> <p>Pre-meeting involving SCPOA & First Rate prior to Sagecrest POA Annual meeting; Jon Kalsbeek, Tony Drost, Lizz Loop; Tara Gardner; See SPOA002756-57; SPOA002751;</p>	<p style="text-align: right;">3</p> <p>1 and they were askin' me about that. And the three 2 times that they had been up there they were -- they 3 tested no carbon monoxide at all. 4 MR. KALSBECK: Okay, did -- did we test it 5 anytime? 6 MS. GARDNER: I tested it the Saturday before 7 that happened, which was four days before. 8 MR. KALSBECK: Okay this first incident 9 happened August 28th, was it -- August 25th? 10 MS. GARDNER: Yes. 11 MR. KALSBECK: Okay, did we test it then? 12 MS. GARDNER: Intermountain Gas came out and 13 tested zero. 14 MR. KALSBECK: Did you test it? 15 MS. GARDNER: No. 16 MR. KALSBECK: Do you write down records or 17 anything of -- of testing it? I -- I'm curious why -- 18 why you're relying on Intermountain Gas to come out and 19 test it and their records versus going out and testing 20 it yourself. 21 MS. GARDNER: 'Cause had happened in the 22 middle of the night. 23 MR. KALSBECK: Okay. 24 MS. GARDNER: And I didn't even know until 25 the next day.</p>
<p style="text-align: right;">2</p> <p>1 MR. DROST: I think we can skip one and two 2 for now. CO2 testing procedures not being used, it's 3 my understanding that they are being used. 4 MS. GARDNER: Yeah, how are they not? 5 MR. KALSBECK: What -- what procedures are 6 you using? Let -- let's start with that. 7 MS. GARDNER: The procedures that we all 8 e-mailed about. 9 MR. KALSBECK: Well we have a -- do you have 10 'em? 11 MS. GARDNER: Uh-huh. These ones. 12 MR. KALSBECK: Okay. When you talked to the 13 fire marshal and -- and on the night of the incident, 14 was this referred to at all? 15 MS. GARDNER: I did tell him that we go 16 through every 90 days and -- and check, yeah. 17 MR. KALSBECK: Okay. 18 MS. GARDNER: They weren't so -- that whole 19 thing was such a blur to me because I was being hounded 20 by 10 different people. It just kinda came and went. I 21 told 'em what we were doing as far as that. He was 22 wanting to know what we were doing with her specific 23 unit. And I told him as soon as the water heater's red 24 tagged we're gonna replace it, obviously. 25 So they had been out there three other times</p>	<p style="text-align: right;">4</p> <p>1 MR. KALSBECK: And why -- 2 MS. GARDNER: So she called Intermountain Gas 3 out. 4 MR. DROST: Do these procedures specifically 5 state for her to test that on a -- 6 MR. KALSBECK: Well -- 7 MR. DROST: -- something like that? 8 MR. KALSBECK: -- it says in here -- and 9 you'll have to go through it because, obviously, trying 10 to put things into order and cover every instance that 11 might happen -- 12 MR. DROST: I look at it like that's how we 13 were goin'. 14 MR. KALSBECK: Well the -- the -- the idea is 15 that -- let me see if I can -- 16 MR. DROST: Well let's just make it easier. 17 If that's what you want, we'll go through this and find 18 -- see if it's in there and if it's not -- 19 MR. KALSBECK: Well -- 20 MR. DROST: -- add it. 21 MR. KALSBECK: Well -- well -- 22 MR. DROST: But my personal thoughts are, if 23 an expert comes out and measures somethin' that -- 24 MR. KALSBECK: Okay. 25 MR. DROST: -- that -- that's a CYA deal.</p>

<p style="text-align: right;">9</p> <p>1 a month and a half.</p> <p>2 MR. DROST: Okay, well I agree with that.</p> <p>3 MR. KALSBECK: Okay.</p> <p>4 MR. DROST: And it's --</p> <p>5 MR. KALSBECK: Not going out --</p> <p>6 MR. DROST: It's on our next --</p> <p>7 MR. KALSBECK: Yeah, not going out and</p> <p>8 testing it and -- and tracking it and saying hey, these</p> <p>9 are what the readings are, isn't protecting the owner</p> <p>10 in the sense there isn't any record except for what</p> <p>11 Intermountain Gas has.</p> <p>12 MR. DROST: We can -- we can change that if</p> <p>13 it doesn't already address it. But if she tested it</p> <p>14 right before and then Intermountain --</p> <p>15 MR. KALSBECK: It --</p> <p>16 MR. DROST: -- Gas came --</p> <p>17 MR. KALSBECK: It was right before the last</p> <p>18 incident. It was --</p> <p>19 MR. DROST: What about --</p> <p>20 MR. KALSBECK: -- a Saturday that --</p> <p>21 MR. DROST: -- the first incident?</p> <p>22 MS. GARDNER: I didn't test it the first</p> <p>23 incident 'cause Intermountain Gas came out and got no</p> <p>24 reading.</p> <p>25 MR. KALSBECK: Okay.</p>	<p style="text-align: right;">11</p> <p>1 MR. KALSBECK: That's the one that -- that --</p> <p>2 MS. GARDNER: I mean, I understand that it's</p> <p>3 the owners' decision 'cause it's the owners' money</p> <p>4 we're spending. But as far as the fire department's</p> <p>5 concerned, I'm the manager and it's my responsibility.</p> <p>6 I mean --</p> <p>7 MR. DROST: Okay, no, I --</p> <p>8 MS. GARDNER: -- I think we should put --</p> <p>9 MR. DROST: I think it's a prudent thing. Is</p> <p>10 there a --</p> <p>11 MS. GARDNER: Yeah.</p> <p>12 MR. DROST: -- a reason why we don't?</p> <p>13 MR. KALSBECK: Okay.</p> <p>14 MS. GARDNER: Some owners --</p> <p>15 MR. KALSBECK: How many CO --</p> <p>16 MS. GARDNER: -- didn't approve it.</p> <p>17 MR. DROST: Who didn't?</p> <p>18 MR. KALSBECK: Who didn't approve what?</p> <p>19 MS. GARDNER: Some owners.</p> <p>20 MR. KALSBECK: Okay.</p> <p>21 MR. DROST: Oh, not all owners did? Okay,</p> <p>22 well as long as we have documentation that we said --</p> <p>23 MS. GARDNER: When --</p> <p>24 MR. DROST: -- we think the prudent thing is</p> <p>25 you hardwire these things in and they say no. We have</p>
<p style="text-align: right;">10</p> <p>1 MS. GARDNER: I didn't find any reason to go</p> <p>2 back and test when -- I mean their machine is a lot --</p> <p>3 MR. DROST: So in --</p> <p>4 MS. GARDNER: -- better than --</p> <p>5 MR. DROST: So in that case wouldn't you just</p> <p>6 be fine if we just got the written documentation of the</p> <p>7 results versus us testing it?</p> <p>8 MR. KALSBECK: Well I think in the future</p> <p>9 that if -- going out and testing a CO detector, which</p> <p>10 is what you're requesting, at five -- \$25 a pop is not</p> <p>11 gonna do anything that it works this minute. I mean</p> <p>12 testing a CO detector --</p> <p>13 MR. DROST: I didn't follow that.</p> <p>14 MR. KALSBECK: Okay. The -- your solution to</p> <p>15 -- to this situation is --</p> <p>16 MS. LOOP: You jumped.</p> <p>17 MR. KALSBECK: What?</p> <p>18 MS. LOOP: You jumped.</p> <p>19 MR. KALSBECK: Oh.</p> <p>20 MS. GARDNER: I -- I don't know if -- your</p> <p>21 comment on that e-mail [phonetic]. I would like to put</p> <p>22 mandatory CO detectors in every unit, mandatory.</p> <p>23 MR. DROST: Well I think that's a good thing.</p> <p>24 I mean that --</p> <p>25 MS. GARDNER: Yeah.</p>	<p style="text-align: right;">12</p> <p>1 their documentation --</p> <p>2 MS. GARDNER: When this whole --</p> <p>3 MR. DROST: -- and then when there's problems</p> <p>4 that --</p> <p>5 MS. GARDNER: Yeah.</p> <p>6 MR. DROST: -- we could pull out the</p> <p>7 it's-not-my-problem -- it's-not-my -- my-issue card.</p> <p>8 MS. GARDNER: But when this whole thing</p> <p>9 happened we were -- durin' turnovers Chris was going to</p> <p>10 put the CO detector -- they're quite a bit more</p> <p>11 expensive than the regular smoke detectors.</p> <p>12 MR. DROST: I understand.</p> <p>13 MS. GARDNER: So during turnovers we were</p> <p>14 gonna have Chris test all the smoke detectors, like he</p> <p>15 does --</p> <p>16 MR. DROST: Right.</p> <p>17 MS. GARDNER: -- and if one of 'em was bad</p> <p>18 and needs replace --</p> <p>19 MR. DROST: Replace it with --</p> <p>20 MS. GARDNER: -- we're asking --</p> <p>21 MR. DROST: -- a CO2 -- yeah.</p> <p>22 MS. GARDNER: With owners' permission. I</p> <p>23 don't think that should be a question. I think that</p> <p>24 should be --</p> <p>25 MR. KALSBECK: Where --</p>

<p style="text-align: right;">13</p> <p>1 MS. GARDNER: -- mandatory.</p> <p>2 MR. KALSBECK: Where -- where did owners'</p> <p>3 permission come in?</p> <p>4 MS. GARDNER: When this whole thing started.</p> <p>5 You --</p> <p>6 MR. KALSBECK: Back last summer?</p> <p>7 MS. GARDNER: You were in that conversation.</p> <p>8 Yes, that it should be -- that when Chris does</p> <p>9 turnovers, if there's one that needs replaced, we</p> <p>10 should replace it -- ask the owners if they wanna</p> <p>11 replace it with a carbon monoxide detector.</p> <p>12 MR. KALSBECK: In March we came up with the</p> <p>13 procedure. How many CO detectors have been replaced?</p> <p>14 Or how many smoke detectors have been replaced with</p> <p>15 hardwired units?</p> <p>16 MS. GARDNER: I -- I sent you that</p> <p>17 spreadsheet the other day. Do you want me to print it</p> <p>18 out?</p> <p>19 MR. KALSBECK: No. Sixty --</p> <p>20 MS. GARDNER: I don't --</p> <p>21 MR. KALSBECK: -- four.</p> <p>22 MS. GARDNER: -- know that number off the top</p> <p>23 of my head.</p> <p>24 MR. KALSBECK: Sixty-four off of a 192 have</p> <p>25 been CO -- hardwired ones --</p>	<p style="text-align: right;">15</p> <p>1 months we only have 64 done?</p> <p>2 MS. GARDNER: Yeah, I guess if that's the</p> <p>3 number.</p> <p>4 MR. KALSBECK: That doesn't -- there's gotta</p> <p>5 be more turnovers and preventative maintenance --</p> <p>6 MR. DROST: We haven't done preventative</p> <p>7 maintenance.</p> <p>8 MS. GARDNER: All summer.</p> <p>9 MR. DROST: Right and --</p> <p>10 MS. GARDNER: 'Cause we've been swamped.</p> <p>11 MR. DROST: We'd have to check on the</p> <p>12 turnover --</p> <p>13 MS. GARDNER: 'Cause it started pickin' up</p> <p>14 on --</p> <p>15 MR. DROST: That's quite a few turnovers --</p> <p>16 MR. KALSBECK: Mm-hm.</p> <p>17 MS. GARDNER: -- preventative maintenance.</p> <p>18 MR. KALSBECK: I -- I -- I just have a -- a</p> <p>19 problem with a third of 'em being changed and then</p> <p>20 having this issue come up.</p> <p>21 MR. DROST: I'm not seeing -- I don't -- I</p> <p>22 don't see the issue. If --</p> <p>23 MR. KALSBECK: Okay.</p> <p>24 MR. DROST: -- that turnover that she's</p> <p>25 replacing it -- it's gettin' done.</p>
<p style="text-align: right;">14</p> <p>1 MS. GARDNER: Mm-hm.</p> <p>2 MR. KALSBECK: -- put in. The reading in</p> <p>3 here is "Carbon monoxide detector combos are to</p> <p>4 eventually be installed in every unit by replacing the</p> <p>5 existing smoke detector currently in the hallway. CO</p> <p>6 monitors shall be changed out or replace existing smoke</p> <p>7 detectors in the hallway area during turnovers,</p> <p>8 preventative maintenance, lease renewals, or faulty</p> <p>9 smoke detectors until complete. Should a smoke detector</p> <p>10 fail in the bedroom, the existing unit in the hallway</p> <p>11 area shall be moved to the bedroom if operational and</p> <p>12 the new CO detector combo shall be installed in the</p> <p>13 hallway."</p> <p>14 MS. GARDNER: Yeah, so --</p> <p>15 MR. KALSBECK: There is absolutely nothing</p> <p>16 about owners' --</p> <p>17 MS. GARDNER: Okay.</p> <p>18 MR. KALSBECK: -- approval.</p> <p>19 MS. GARDNER: Starting in March, though,</p> <p>20 before that, last August when this whole thing started,</p> <p>21 that's when we were doing it per owner. And then the</p> <p>22 whole thing in March happened and then that's when we</p> <p>23 changed it. So from March on we're puttin' 'em in all</p> <p>24 units.</p> <p>25 MR. KALSBECK: So you're tellin' me in eight</p>	<p style="text-align: right;">16</p> <p>1 MR. KALSBECK: Okay, so they're all being --</p> <p>2 well you just got done saying that it -- it was the</p> <p>3 owners' that didn't wanna --</p> <p>4 MR. DROST: That was prior to March.</p> <p>5 MS. GARDNER: That was prior to March, yes.</p> <p>6 MR. KALSBECK: Okay, now we're automatically</p> <p>7 doing it?</p> <p>8 MS. GARDNER: Yes, but we -- we haven't</p> <p>9 turned over a 192 properties since March, is my only</p> <p>10 thing. So there are still some units that, obviously,</p> <p>11 don't have them in them. So those units I would like</p> <p>12 Chris to go through and install one just so we're all</p> <p>13 safe, the tenants, us, the Association, everybody. He</p> <p>14 is doing it on preventative maintenance. He just</p> <p>15 finished four buildings, so --</p> <p>16 MR. DROST: So --</p> <p>17 MS. GARDNER: -- there's four that have them.</p> <p>18 MR. DROST: So the preventative maintenance</p> <p>19 is bein' -- is starting now. So they're all gonna be</p> <p>20 done anyway.</p> <p>21 MS. GARDNER: He started 'em before summer.</p> <p>22 When summer hit he was swamped with turnovers.</p> <p>23 MR. DROST: Yeah.</p> <p>24 MS. GARDNER: He didn't -- I think he did,</p> <p>25 maybe, two preventative maintenance during summer.</p>

<p style="text-align: right;">17</p> <p>1 MR. DROST: Yeah, but he's starting it now.</p> <p>2 MS. GARDNER: Yeah --</p> <p>3 MR. DROST: Okay, so if --</p> <p>4 MS. GARDNER: -- at Building --</p> <p>5 MR. DROST: -- he's starting --</p> <p>6 MS. GARDNER: -- 34.</p> <p>7 MR. DROST: If he's starting preventative</p> <p>8 maintenance, by -- by definition they'll --</p> <p>9 MS. GARDNER: Yeah.</p> <p>10 MR. DROST: -- all be replaced anyway?</p> <p>11 MS. GARDNER: Yeah.</p> <p>12 MR. DROST: Right?</p> <p>13 MS. GARDNER: Yeah.</p> <p>14 MR. DROST: Okay, so we're good?</p> <p>15 MR. KALSBEEK: Yeah, I -- I don't see any</p> <p>16 problems as long as -- as long as we're following this.</p> <p>17 UNIDENTIFIED FEMALE: Just out of curiosity,</p> <p>18 how many did -- refused to put them in?</p> <p>19 MS. GARDNER: I -- I don't know off the top</p> <p>20 of my head.</p> <p>21 MR. KALSBEEK: Do you have any documentation</p> <p>22 they --</p> <p>23 MS. GARDNER: I have --</p> <p>24 MR. KALSBEEK: -- refused it?</p> <p>25 MS. GARDNER: -- e-mails, yes.</p>	<p style="text-align: right;">19</p> <p>1 only mention is that -- that you had Chris go in and</p> <p>2 make sure it's working.</p> <p>3 MR. DROST: If -- if I may?</p> <p>4 MR. KALSBEEK: You see that?</p> <p>5 MR. DROST: So after our conversation -- I'm</p> <p>6 trying to figure out why this always -- continues to be</p> <p>7 a problem.</p> <p>8 MR. KALSBEEK: Mm-hm.</p> <p>9 MR. DROST: And -- and I'm fine with the</p> <p>10 solution by the way. I mean so it -- but nonetheless,</p> <p>11 communications gonna be the key.</p> <p>12 When I communicate with Tara and I say this</p> <p>13 is what I want --</p> <p>14 MR. KALSBEEK: Uh-huh.</p> <p>15 MR. DROST: -- a lot of times I don't get the</p> <p>16 response that I wanted. Perhaps I didn't describe it</p> <p>17 well enough or her brain didn't go to the --</p> <p>18 MR. KALSBEEK: Mm-hm.</p> <p>19 MR. DROST: Let's -- we'll use the tree as an</p> <p>20 example. If she e-mailed me and said the tree needs</p> <p>21 replaced, I would respond with why, says who, and can I</p> <p>22 maybe see what it looks like so I can better</p> <p>23 understand? Or you know, I could drive out. I would</p> <p>24 respond with that, making it very clear what I wanted</p> <p>25 and then I always get it.</p>
<p style="text-align: right;">18</p> <p>1 MR. KALSBEEK: E-mails, okay. All right.</p> <p>2 See, things like that should be -- should be tracked so</p> <p>3 that we can find out and follow-up.</p> <p>4 Okay. When -- when we talked on the phone</p> <p>5 with the conversation, the -- the conference call and</p> <p>6 you were gonna go talk to the fire marshal --</p> <p>7 MS. GARDNER: Yes.</p> <p>8 MR. KALSBEEK: -- okay, the e-mail you sent</p> <p>9 after that was that he didn't bring up the incident. So</p> <p>10 this wasn't even brought up to him.</p> <p>11 MS. GARDNER: That was brought up when I --</p> <p>12 when the whole thing happened and I was out there with</p> <p>13 the fire company [sic.] and the gas. And he -- the</p> <p>14 fire marshal was there then.</p> <p>15 MR. KALSBEEK: Okay. I'm -- I'm -- this is</p> <p>16 my concern and I'm trying to -- to figure out. How do</p> <p>17 you feel our communication is?</p> <p>18 MS. GARDNER: Fine.</p> <p>19 MR. KALSBEEK: Fine, okay.</p> <p>20 MR. DROST: I don't.</p> <p>21 MR. KALSBEEK: I don't either.</p> <p>22 MS. GARDNER: Okay.</p> <p>23 MR. KALSBEEK: Okay, because in here there is</p> <p>24 no mention of what those procedures are. There's no</p> <p>25 mention in the discussion with the fire marshal. The</p>	<p style="text-align: right;">20</p> <p>1 So we're not closing that loop --</p> <p>2 MR. KALSBEEK: Uh-huh.</p> <p>3 MR. DROST: -- and then the question lingers</p> <p>4 and lingers and lingers, which becomes harder and</p> <p>5 harder. So I -- I -- I just brought up demand</p> <p>6 [phonetic] --</p> <p>7 MS. GARDNER: What needs done --</p> <p>8 MR. DROST: Yeah --</p> <p>9 MS. GARDNER: -- that's --</p> <p>10 MR. DROST: -- I mean, I --</p> <p>11 MS. GARDNER: -- like --</p> <p>12 MR. DROST: -- and -- and I ain't -- I ain't</p> <p>13 movin' on until it's done and -- and I'm gonna be on</p> <p>14 her -- on stink on -- if it's gets dropped, which</p> <p>15 happens, they forget -- I don't, do I, Lizz?</p> <p>16 MS. LOOP: No.</p> <p>17 MR. DROST: And I'm not happy about it --</p> <p>18 MS. LOOP: Which is good; I'm glad.</p> <p>19 MR. DROST: Yeah, but I'm not happy about it.</p> <p>20 But nonetheless, I -- I don't let the issue die until</p> <p>21 it's resolved to my satisfaction.</p> <p>22 MR. KALSBEEK: Okay.</p> <p>23 MS. GARDNER: Would --</p> <p>24 MR. DROST: So I -- I just think that's part</p> <p>25 of the issue is she's not giving me the response, like</p>

<p style="text-align: right;">93</p> <p>1 MS. GARDNER: I have one; I called her and I 2 put it -- I believe I put it in an e-mail recently. I 3 called and I said okay, you filled out the form, you 4 signed it, but you didn't circle it accept or denied. 5 And she said well I don't know, I don't care, that's up 6 to you guys. 7 MR. DROST: So did you circle it? 8 MS. GARDNER: No, I didn't -- I didn't want 9 to get in trouble for perjury or forging or anything. 10 If you tell me to sign it I'll -- I'll circle it. Yeah, 11 I know we want to do 'em. She goes I don't care if you 12 do it. It's up to you. 13 MS. LOOP: And I don't care is a yes. 14 MS. GARDNER: That's what I was wanting 15 that -- 16 MR. DROST: Will you send me the tracking 17 sheet? 18 MS. GARDNER: Yes. 19 MR. DROST: 'Cause I'm telling you, you're 20 going to get your written votes to Pathos. 21 MS. GARDNER: Not by the meeting. 22 MR. DROST: This is how you're going to get 23 your written votes. 24 MR. KALSBEEK: Not this trip. 25 MS. GARDNER: Not by the meeting, and I can</p>	<p style="text-align: right;">95</p> <p>1 to do it at the meeting. I was just curious. 2 MR. DROST: Well yeah, we'll let -- 3 MR. KALSBEEK: No, I'm going to charge them 4 \$1 a day for everyday they don't do it after November 5 1st, and if everybody votes on it and passes it, then 6 we're going to charge \$1 a day for every vote that 7 doesn't get in by November 1st. 8 MS. GARDNER: Now they're all going to be mad 9 at me because I'm giving them one day to do this. 10 MR. KALSBEEK: That gives them five days. 11 MR. DROST: You have not given them one day. 12 You've sent this son of a bitch how many times? 13 MS. GARDNER: Well, yeah, but now 14 [indiscernible] send it back to me tomorrow, that day. 15 MR. DROST: Huh? No, what you're doing is 16 trying to help them do their job. 17 MS. LOOP: Holding their hand, following up 18 with them, making sure they got it and send it back in. 19 MR. DROST: Yeah, welcome to management . 20 How fans have been received and working out. 21 MS. LOOP: We talked about that yesterday. 22 MR. DROST: How fans? 23 MR. KALSBEEK: Fans, new fans. 24 MS. LOOP: Tara suggested fans. 25 MR. DROST: Oh yeah, that's fine.</p>
<p style="text-align: right;">94</p> <p>1 continue to call and follow up with them and say, you 2 know, we're still looking to update. It didn't happen 3 at the meeting 'cause -- 4 MR. DROST: Can we just e-mail them the -- 5 MS. GARDNER: Voting form? 6 MR. DROST: Just the form. 7 MS. GARDNER: Yeah. 8 MR. DROST: Say print this out, sign it, and 9 send it back today or Tony's going to charge you extra 10 money. 11 MS. GARDNER: Yeah, whatever, and I will 12 e-mail -- 13 MR. DROST: That's the one true way of 14 getting people to respond to POAs. 15 MR. KALSBEEK: That's what I was going to do 16 at the meeting. 17 MR. DROST: Is say -- anytime you say we're 18 raising costs, then they get involved. 19 MS. GARDNER: Mm-hm. 20 MR. DROST: Anything else, well Chuck's doing 21 a good job, I'm just not going to pay attention. 22 MS. GARDNER: Yeah. So we'll tell them there 23 will be an increase in their management fees. 24 MR. DROST: No, I'm kidding . 25 MS. GARDNER: Oh, well Jon said he was going</p>	<p style="text-align: right;">96</p> <p>1 MS. GARDNER: Ceiling fans. 2 MR. DROST: And other upgrades, right? 3 MR. KALSBEEK: Mm-hm. 4 MR. DROST: And? 5 MS. GARDNER: Yeah, the fans are working. 6 MS. LOOP: Do the tenants like 'em? 7 MS. GARDNER: Yeah, they do. 8 MR. KALSBEEK: How many additional fans have 9 been installed? 10 MS. GARDNER: The ones that I have that still 11 need to be installed; one, two, three, four, five, six, 12 seven, eight -- 13 MR. KALSBEEK: Not ours, beyond ours. 14 MS. GARDNER: None, other than yours. 15 MR. KALSBEEK: And how many people have said 16 no? 17 MS. GARDNER: How many owners? 18 MR. KALSBEEK: Uh-huh. 19 MS. GARDNER: I'd have to go back and check. 20 I don't know off the top off my head. 21 MR. DROST: Did we give that option to all 22 the owners? 23 MS. GARDNER: Yeah. 24 MR. DROST: Oh. 25 MR. KALSBEEK: Well yesterday you told us it</p>

<p style="text-align: right;">97</p> <p>1 was two.</p> <p>2 MS. GARDNER: Two others that said no?</p> <p>3 MR. KALSBECK: Mm-hm.</p> <p>4 MS. GARDNER: That sounds about right. I</p> <p>5 can't guarantee that. I don't know that off the top of</p> <p>6 my head.</p> <p>7 MR. KALSBECK: Okay well I'm just saying,</p> <p>8 that's what we talked about yesterday when we did the</p> <p>9 additional fans. You said you'd only contacted two and</p> <p>10 they'd said no, so I would think on turnovers is the</p> <p>11 way we discussed it was to tell owners that these</p> <p>12 upgrades and these improvements should be done to</p> <p>13 increase your rents and increase your -- your</p> <p>14 productivity. I thought that's the way we left it</p> <p>15 back in July.</p> <p>16 MS. GARDNER: Yeah, and then the painting --</p> <p>17 MR. KALSBECK: Well painting we nixed.</p> <p>18 MS. GARDNER: -- we decided not to.</p> <p>19 MS. LOOP: Yeah, it didn't work.</p> <p>20 MR. DROST: Because you're painting over that</p> <p>21 faux wood.</p> <p>22 MS. GARDNER: 'Cause yeah, and it was going</p> <p>23 to be way too expensive for --</p> <p>24 MR. DROST: 'Cause well -- yeah, and it --</p> <p>25 even -- I mean, it --</p>	<p style="text-align: right;">99</p> <p>1 detector combo was not optional. The fan was optional.</p> <p>2 MS. LOOP: Yeah.</p> <p>3 MR. DROST: Do you -- and all I was part of</p> <p>4 it was that we were going to do a test and see how it</p> <p>5 worked.</p> <p>6 MS. LOOP: For the fans?</p> <p>7 MR. DROST: Yeah.</p> <p>8 MS. LOOP: Yeah, we tested on Jon's unit.</p> <p>9 MR. DROST: And it worked?</p> <p>10 MS. LOOP: Mm-hm.</p> <p>11 MR. DROST: All right. Do you want to do --</p> <p>12 then she doesn't have to ask owners for their</p> <p>13 permission, in my opinion. How much do the fans cost?</p> <p>14 MR. KALSBECK: \$40.</p> <p>15 MR. DROST: How many fans per unit?</p> <p>16 MR. KALSBECK: One.</p> <p>17 MR. DROST: That's all we're doing, is a fan?</p> <p>18 MS. LOOP: Yeah.</p> <p>19 MR. KALSBECK: It's going to come up at the</p> <p>20 meeting that I -- that the POA is not going to get</p> <p>21 involved in installing fans and telling owners that</p> <p>22 fans weren't installed.</p> <p>23 MR. DROST: It's going to come up at the</p> <p>24 meeting?</p> <p>25 MR. KALSBECK: Yeah, it is a suggestion like</p>
<p style="text-align: right;">98</p> <p>1 MS. GARDNER: And the quality wouldn't be --</p> <p>2 MR. DROST: It's going to take a lot of prep</p> <p>3 work.</p> <p>4 MS. GARDNER: Yeah.</p> <p>5 MR. DROST: That faux wood is just (spitting</p> <p>6 noise).</p> <p>7 MS. GARDNER: Yeah.</p> <p>8 MR. DROST: So I mean, as those -- as the</p> <p>9 faux wood goes crap, I would recommend a paintable</p> <p>10 door.</p> <p>11 MR. KALSBECK: Okay so anyway, what we were</p> <p>12 trying to get at is when you did turnovers and we've</p> <p>13 had quite a few turnovers, is the smoke detectors were</p> <p>14 not optional.</p> <p>15 MS. GARDNER: Right.</p> <p>16 MR. KALSBECK: They were supposed to be done.</p> <p>17 MR. DROST: And they are.</p> <p>18 MR. KALSBECK: Well I'm saying that there</p> <p>19 should have been more than 64 done since March is what</p> <p>20 I'm saying. There were more than 64 turnovers.</p> <p>21 MS. LOOP: I don't think there's been more</p> <p>22 than 64 turnovers.</p> <p>23 MR. KALSBECK: You don't think so? Okay. At</p> <p>24 the same time of the turnover, was going to be the fan</p> <p>25 suggestion, for them to do the fan, but the smoke</p>	<p style="text-align: right;">100</p> <p>1 the PRV valves and the other stuff.</p> <p>2 MR. DROST: Oh well then that's good, yeah.</p> <p>3 I mean, if you make the recommendation to them; \$40 to</p> <p>4 get -- I mean, if you want you can -- so then they show</p> <p>5 up, you say the rent is this, if you'd like a nice</p> <p>6 ceiling fan installed in the master bedroom, it's</p> <p>7 another \$5 a month. So now you're making \$20 more.</p> <p>8 MR. KALSBECK: Well I don't think you want to</p> <p>9 take that on, do you?</p> <p>10 MS. GARDNER: It's quite a lot to keep track</p> <p>11 of.</p> <p>12 MR. DROST: Oh, okay (laughs). It's not</p> <p>13 something to keep track of. You do the showing and</p> <p>14 they say yeah, I want the ceiling fan. Okay.</p> <p>15 MR. KALSBECK: And you charge them \$5 more a</p> <p>16 month.</p> <p>17 MS. LOOP: Anyway, that's an owner decision</p> <p>18 and expense. You can't --</p> <p>19 MR. DROST: \$40 ceiling fan?</p> <p>20 MS. GARDNER: They're not that attractive, no</p> <p>21 offense. They're really not though.</p> <p>22 MR. DROST: I was going to say --</p> <p>23 MR. KALSBECK: Which one did you see?</p> <p>24 MS. GARDNER: The ones that Chris is</p> <p>25 installing.</p>

1 MS. GARDNER: No, she found it before that
 2 because she took it --
 3 MS. LOOP: Maybe there's something stuck down
 4 in --
 5 MS. GARDNER: Yeah, every drawer had been
 6 gone through. I don't know where.
 7 MR. DROST: Did you annotate that?
 8 MS. GARDNER: No, I will.
 9 MR. DROST: Big, big thick file I have, add
 10 that.
 11 MS. GARDNER: Okay.
 12 MR. DROST: But that still goes under
 13 neglect. Not fraud; fraud was the other stuff.
 14 MR. KALSBECK: Okay.
 15 MR. DROST: Hmm, man, I can't wait to go to
 16 my next appointment.
 17
 18
 19
 20
 21
 22
 23
 24
 25

1 STATE OF COLORADO)
 2) ss. . CERTIFICATE
 3 COUNTY OF DENVER)
 4
 5 I, Christopher Boone, Certified Electronic
 6 Court Reporter and Notary Public within and for the
 7 State of Colorado, certify that the foregoing is a
 8 correct transcription from the digital recording of
 9 the proceedings in the above-entitled matter.
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 11 I further certify that I am neither counsel
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 14 further that I am not financially or otherwise
 15 interested in the outcome of the action.
 16
 17 In witness whereof, I have affixed my
 18 signature this 13th day of May, 2014.
 19
 20
 21 My commission expires August 16, 2014.
 22
 23
 24 _____
 25 Christopher Boone,
 AAERT Certified Electronic Court Reporter

10

From: VJK <aire1@pacbell.net>
Sent: Thursday, August 04, 2011 8:03 PM
To: Bill Raff
Cc: Tony Drost; Sheila Thomason; Beth
Subject: Re: Professional inspection.

Thank you for taking an interest in the matter and making suggestions to find solutions. Agreed Bill, to pool resources is very beneficial to all. The WH and many other issues like PRV's, expansion tanks, filters, sewers, pool, and landscape all have been resolved in this manner. The board has been advised of the WH situation and is reviewing the options based on Express Plumbing, Gas company, Sheila's, and other resources - all played a part in researching this issue. Due to the possible hazardous conditions that have been created, the changing of WH is needed in some units immediately, this action is being taken. As for a long term fix, the research shows - The new WH have a larger exhaust vent and this matches the size of the existing flue; the vents for intake air on the new WH are not under the WH they are on the sides, better design and wall vents are being researched to see the possibility of enlarging them; the cleanliness of the area is more difficult - at this time arrangements are being made to check the WH area each time the HVAC filters are changed; we have discussed a short wall to prevent lint and dust from entering the WH area - at this time they tell me this is not the best because lint and dust are airborne, not sure I agree with this answer; CO2 monitors are being installed and a discussion of temp. or permanent, battery or AC powered, and how to ensure the tenant is protected as well as the owner. The POA and FRPM have also researched out the builders insurance, bonds, building codes, water heater warranties, and several other recourse actions to no avail, still searching for a source to pay for poor building quality of the complex.

As you can see there has been a lot of research into this issue and solutions are being implemented. Yes, Sheila has done a great job on keeping people informed and enacting the solutions thus far. There is the possibility of having Stan review the situation and give impute, we will see what happens. The POA is and has been proactive in following through with finding cost effective solutions for all owners. Hence, if an owner would like to go beyond what the POA and FRPM is doing, then they certainly may(at their cost), at this time we believe every option and solution is being reviewed for viability. We do not want this to happen in the future.

The board is reviewing the information and have been informed of your suggestions, should they feel that additional research is necessary, we will not hesitate to obtain any information from any source available. As always, your impute is important and appreciated, good to hear from you.

 *Virginia and Jon* 

--- On Thu, 8/4/11, Bill Raff <wmraffdesigns@yahoo.com> wrote:

From: Bill Raff <wmraffdesigns@yahoo.com>
Subject: Professional inspection.
To: "Jon Kalsbek" <aire1@pacbell.net>
Cc: "Tony Drost" <Tony@FRPMRENTALS.COM>, "Sheila@FRPMRENTALS.COM" <Sheila@FRPMRENTALS.COM>, "Beth" <raffbeth@yahoo.com>
Date: Thursday, August 4, 2011, 11:13 AM

CONFIDENTIAL

FR01755

000421

Jon,

While the WH's are the owners responsibility, the original design flaw affects all of the owners. Don't you think it would be most economical to have a professional look at the situation and for the cost of an individual evaluation benefit all the owner's? If I decide to have an appraisal made by a professional on my single unit, I suppose I could be nice and share my findings with all those that own the same floor plan, but why should I have to, it seems to me that this is exactly what an association is for, pooling our resources when the group will benefit. It seems just a matter of time before all of the units will get notice that they need the WH's replaced for the same reason.

If you know of any owner's that have solved their problem already, perhaps they could share their approach?

This is a potentially serious problem with enormous consequence to all owners and the association. We need to handle it as such and proceed as a unified body in case there are any legal repercussions.

I would appreciate it if as President Jon, you would bring all the owners into a discussion on this so that we can understand the feelings of others and work together on a solution that will protect our interests as a whole.

By the way, I think Sheila (and FRPM) is (are) doing a great job on this and I appreciate her (their) efforts. Thank you Sheila and FRPM.

Thank you Jon in advance,

Bill Raff
Santa Fe Springs, CA 90670
562 331 8355 Direct
562 868 2814 Fax

CONFIDENTIAL

FR01756

000422

From: VJK <aire1@pacbell.net>
Sent: Friday, April 15, 2011 3:32 PM
To: Sagecrest; Sheila Thomason
Cc: Lizz Loop; Marie Swanson
Subject: RE: Water heaters- gas smell
Attachments: image001.png

Categories: Tara

This seems to be a very expensive solution to have a plumber come out and vacuum vents for water heaters. Why not have Chris learn what needs to be done to do it correctly at a lower cost? Are these only going to be done at turnovers? The vents need to be cleaned at least annually for preventative maintenance to be effective, is this something that if regularly vacuumed will not require a labor intensive process? These could be done at the same time as the filter changes maybe?

 Virginia and Jon 

--- On Fri, 4/15/11, Sheila Thomason <Sheila@FRPMRENTALS.COM> wrote:

From: Sheila Thomason <Sheila@FRPMRENTALS.COM>
Subject: RE: Water heaters- gas smell
To: "Sagecrest" <sagecrest@FRPMRENTALS.COM>, "VJK" <aire1@pacbell.net>
Cc: "Lizz Loop" <Lizz@FRPMRENTALS.COM>, "Marie Swanson" <Marie@FRPMRENTALS.COM>
Date: Friday, April 15, 2011, 1:51 PM

No. Please do not have Chris vacuum these. This is something the plumber needs to do. I already asked them when I went and had my "plumbing training" at their shop. In order to clean it properly some things have to be taken apart so it can get cleaned from both sides or it would be pointless and/or could cause more problems. I will be in Meridian shortly and will explain. This will be a common problem since the units are located next to the dryers.

I would really like for you to go to meet with Ben at the Express Plumbing shop(Nampa). He has a "training wall" that he uses for his guys and I learned a ton that morning. He also has an electric and gas water heater cut open so you can see inside and how everything works. It was VERY educational. I was going to see if you wanted to come with me but you were sick that day ☺

Thanks,

Sheila

CONFIDENTIAL

FR04798

000424

From: Sagecrest
Sent: Friday, April 15, 2011 2:45 PM
To: VJK
Cc: Sheila Thomason; Lizz Loop; Marie Swanson
Subject: Water heaters- gas smell

Intermountain gas came out today and inspected an empty unit to try to find out what is causing the gas smell from the water heaters. He said the problem is with the venting. There are two different kinds of water heaters here, some have a metal screen around the bottom of the tank, the others don't have the screen that goes around, but one in the middle on the bottom. Those get clogged with lint, hair, debris very easily and if there is not adequate air flow from the bottom then the water heater cannot release exhaust. He said we just need to clean/vacuum off the screens and it will be fine. I think we should add this to the turnover spreadsheet under Typical Items for Chris to vacuum out the bottom area and screens. Let me know if this is ok to add to the list of turnover items.

Thanks,

Tara

Tara Gaertner

Sagecrest Apartments

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F: (208) 884-3487

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FR04799

000425

12

From: VJK <aire1@pacbell.net>
Sent: Tuesday, April 19, 2011 1:32 PM
To: Sagecrest
Cc: Lizz Loop; Marie Swanson; Sheila Thomason
Subject: Re: FW: Water heaters- gas smell
Attachments: image001.png; ~WRD000.jpg

Let us review this and get back to you next week.

 *Virginia and Jon* 

--- On Mon, 4/18/11, Sagecrest <sagecrest@FRPMRENTALS.COM> wrote:

From: Sagecrest <sagecrest@FRPMRENTALS.COM>
Subject: FW: Water heaters- gas smell
To: "VJK" <aire1@pacbell.net>
Cc: "Lizz Loop" <Lizz@FRPMRENTALS.COM>, "Marie Swanson" <Marie@FRPMRENTALS.COM>, "Sheila Thomason" <Sheila@FRPMRENTALS.COM>
Date: Monday, April 18, 2011, 12:53 PM

Hi Jon,

Below is the cost to clean the water heaters. Please let me know the next step. Do I schedule to have this done periodically, or as the problem arises?

Thank You,

Tara

Tara Gaertner

Sagecrest Apartments

First Rate Property Management

P: (208) 514-4304

F: (208) 884-3487

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FR04807

000427

CARBON MONOXIDE PROCEDURES

Revised Date: March 20, 2012

Throughout this process, continued diligence is necessary to protect tenants safety and complex from possible hazardous conditions. Our goal is to have a safe and comfortable environment.

These procedures shall be followed for detecting CO (carbon monoxide) levels in units:

- A. Air filters shall be changed monthly; by 10-12 buildings at a time, starting April 2012
- B. During filter changes; the carbon monoxide detector testing unit shall be turned on prior to entering each unit, warmed up, and set to zero. Once in the unit, the tester shall be set on the kitchen counter sampling the air in the hall and living room.
- C. During the time of testing, the filter shall be changed, the area around the water heater inspected and cleaned-if necessary.
- D. Once the filter and water heater areas are completed, the tester shall be read. If the reading is below 30ppm, no further action is required.

Action required if:

- E. If the tester reading is 30ppm or above in the room- a proper test shall be conducted in the flue of the water heater. Be sure to turn on all hot water in the apartment so water heater can turn on and reach operating temperature, reset the tester to zero and make sure the water heater runs approximately 5 minutes prior to testing the air in the flue.
- F. If the air in the flue tests results in a reading between 100 and 300ppm, a note to call the owner shall be made to discuss replacement of the water heater. At the time of calling the owner, a follow up email for documentation shall be sent to the owner. At this time, a UL approved carbon monoxide/smoke detector combo shall be installed in the area of the hallway; unless one is already present. Should the owner elect not to change the water heater at this time, a second test shall be conducted on the water heater flue at operating temperature in 25 to 30 calendar days. Continue to do so every 25 to 30 calendar days until a safe condition exists-below 100ppm in the flue. Educate tenants. Should the water heater proper flue testing result in a higher reading than 300ppm at any time during this period, proceed to next step, G.
- G. If air in the flue tests 300ppm or above, note the reading, then, contact owner and inform immediate water heater replacement is required, followed up with an email for documentation. If owner refuses water heater replacement, advise owner Intermountain Gas is to be contacted so they can conduct a test of the unit. Should the results from this test be out of limits according to Intermountain Gas, a mandatory shutdown of the water heater will be done by the gas company. Should the owner not respond by phone or email within 24 hours of email notification, then, contact Intermountain Gas to conduct further testing. Educate tenants. At this point, a CO monitor shall be in place and operational, if one is not in place, install a CO/smoke monitor combo-UL approved in the hallway area.

Carbon monoxide/smoke detector combos are to eventually be installed in every unit by replacing the existing smoke detector currently in the hallway area. CO monitors shall be changed out or replace existing smoke detectors in the hallway area during -- turnovers, preventative maintenance, lease renewals, or faulty smoke detector - until complete. (Should a smoke detector fail in a bedroom, the existing unit in hallway area shall be moved to the bedroom, if operational, and a new carbon monoxide/smoke detector shall be installed in hallway area.)

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)
HYMAS, individually and as)
the natural parents of)
PRIVATE FIRST CLASS McQUEN C.)
FORBUSH, USMC (Deceased),)
and BREANNA HALOWELL,)

Plaintiffs,)

vs.)

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY)
OWNERS' ASSOCIATION, INC., an)
Idaho non-profit corporation,)
d/b/a SAGECREST MULTIFAMILY)
PROPERTY OWNERS' ASSOCIATION,)
et al.,)

Defendants.)

DEPOSITION OF TARA GAERTNER

January 2 and 3, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

<p>1 MS. WILLMAN: Clarification, you're talking 2 about FR 256 when you say "bottom of page 2"? 3 MR. CLARK: Correct. 4 Q. (BY MR. CLARK) Having reviewed this, is 5 this a true and correct copy of your e-mail? 6 A. Yes. 7 Q. And for clarification, there's a 8 follow-on e-mail at the top of page -- the first 9 page, FR 255. 10 A. Uh-huh. 11 Q. Is that also your e-mail? 12 A. Yes. 13 Q. Okay. And it's dated -- the e-mail at 14 the bottom of the page is dated 3/14/12. 15 Is that correct? 16 A. Uh-huh. 17 MR. ANDERSON: Say "yes" or "no." 18 THE WITNESS: I'm sorry. Yes. 19 Q. (BY MR. CLARK) Can you describe why you 20 are sending Jon this e-mail? 21 MR. ANDERSON: I'm going to object because 22 that's not in accordance with what it says. This 23 is a draft e-mail, and you've just elevated it to 24 something that she actually sent. It says, "I'm 25 going to send him this e-mail." So it's a draft.</p> <p style="text-align: right;">[Page 71]</p>	<p>1 And Jon told Chris that owners were mad 2 at me and I basically wasted their money by having 3 those water heaters replaced. 4 Q. Okay. 5 A. And I was angry, if you can see. 6 Q. You weren't too happy about it? 7 A. No. 8 Q. Okay. On page 256, it says, "I met with 9 Intermountain Gas and Express Plumbing. You did 10 not. They trained me on how to test the water 11 heaters, and I did it according to their 12 instructions." 13 MR. ANDERSON: Do you see where he's 14 reading? I think he started here. 15 THE WITNESS: Okay. Yes. 16 MR. CLARK: Okay. 17 MR. ANDERSON: She's with you now. 18 Q. (BY MR. CLARK) And then skipping a line, 19 it says, "You can call Intermountain Gas and 20 Express and confirm that I am doing it correctly." 21 Is that correct? 22 A. Yes. 23 Q. If I remember your testimony earlier 24 today, you had said that Intermountain Gas was 25 critical of your testing in March 2012.</p> <p style="text-align: right;">[Page 73]</p>
<p>1 MR. CLARK: And I thought I said, "You were 2 sending to" -- 3 MR. ANDERSON: Jon. 4 MR. CLARK: -- "Jon." 5 MR. ANDERSON: I just want to make sure 6 you're clear on that. 7 MR. CLARK: I didn't say, "You sent it to 8 Jon." I said, "You were sending it." But I 9 understand your objection. 10 MR. ANDERSON: Okay. 11 MR. CLARK: That's fine. 12 Q. (BY MR. CLARK) So this is a draft of an 13 e-mail you were writing to Jon, correct? 14 A. Correct. 15 Q. Do you recall whether you ever sent this 16 e-mail to Jon? 17 A. I did not. 18 Q. Okay. With regard to the contents of 19 the e-mail, what prompted you to write this e-mail? 20 A. Chris, the maintenance guy at Sagecrest, 21 had come in. I don't know how Chris knew. I think 22 he had spoken to Jon on the phone and Jon had told 23 him that I had a bunch of water heaters replaced 24 that was unnecessary, they didn't need to be 25 replaced.</p> <p style="text-align: right;">[Page 72]</p>	<p>1 A. Yeah. 2 Q. Is that correct? 3 A. Yes. 4 Q. Okay. As you move down the page, about 5 almost midway down, it says, "I'm not going to be 6 testing these anymore." 7 Is that correct? 8 A. I said that, yes. 9 Q. Okay. Let me move up to the top of page 10 255. This is a letter that -- or the e-mail that 11 you sent from you to Sheila. 12 Is that correct? 13 A. It looks like Sheila, Lizz, and Marie. 14 Q. Okay. What prompted you to write this 15 e-mail that's contained on the top of the first 16 page? 17 A. I had talked to Jon on the phone, and he 18 said we were going to -- he was coming into town 19 and we were going to have a meeting and he was 20 going to write down procedures. 21 Q. Okay. Did that happen? 22 A. Yes. 23 Q. Okay. You put, "They're just trying to 24 put the fear of God in us," end quote. "He's such 25 an idiot."</p> <p style="text-align: right;">[Page 74]</p>

[23] (Pages 71 to 74)

<p>1 What are you referring to?</p> <p>2 A. That is what Jon told me.</p> <p>3 Q. Who is putting the fear of God?</p> <p>4 A. Intermountain Gas.</p> <p>5 Q. And what did you tell him to prompt his</p> <p>6 response?</p> <p>7 A. His response to what?</p> <p>8 Q. To "trying to put the fear of God in</p> <p>9 us."</p> <p>10 MR. ANDERSON: Object to the form.</p> <p>11 Q. (BY MR. CLARK) Did you have a</p> <p>12 conversation with Mr. Kalsbeek about Intermountain</p> <p>13 Gas and the testing procedures Intermountain Gas</p> <p>14 provided to you --</p> <p>15 A. Yes.</p> <p>16 Q. -- instructed you to use?</p> <p>17 A. Yes.</p> <p>18 Q. And what was his response?</p> <p>19 A. What was Jon's response?</p> <p>20 Q. Yes.</p> <p>21 A. I -- I don't recall other than they're</p> <p>22 just trying to put the fear of God in us.</p> <p>23 Q. Well, what was he referring to? What</p> <p>24 was Mr. Kalsbeek referring to?</p> <p>25 A. I don't remember.</p> <p style="text-align: right;">[Page 75]</p>	<p>1 MR. CLARK: Would you read that back,</p> <p>2 Andrea.</p> <p>3 (Record read by reporter.)</p> <p>4 THE WITNESS: I don't recall what he thought</p> <p>5 I was doing wrong exactly.</p> <p>6 Q. (BY MR. CLARK) You talked about a</p> <p>7 subsequent meeting with Mr. Kalsbeek when he came</p> <p>8 back into town.</p> <p>9 Is that correct?</p> <p>10 A. Uh-huh.</p> <p>11 Q. When was that meeting?</p> <p>12 MR. ANDERSON: You have to say "yes" or</p> <p>13 "no."</p> <p>14 THE WITNESS: Yes. I'm sorry.</p> <p>15 MR. ANDERSON: No problem.</p> <p>16 THE WITNESS: When was the meeting? I don't</p> <p>17 recall the exact date. It was shortly after this</p> <p>18 e-mail, maybe a week or so after.</p> <p>19 Q. (BY MR. CLARK) Do you recall, was there</p> <p>20 a discussion in this next meeting about the testing</p> <p>21 procedures --</p> <p>22 A. Yes.</p> <p>23 Q. -- CO testing procedures?</p> <p>24 And what was Mr. Kalsbeek's criticism,</p> <p>25 if any, of the way you were testing for CO at</p> <p style="text-align: right;">[Page 77]</p>
<p>1 Q. Was Mr. Kalsbeek critical of your</p> <p>2 testing procedures?</p> <p>3 A. Yes.</p> <p>4 MR. HOWELL: Objection; form.</p> <p>5 Q. (BY MR. CLARK) Did you describe to</p> <p>6 Mr. Kalsbeek what Intermountain Gas had -- how</p> <p>7 Intermountain Gas had instructed you to test?</p> <p>8 A. Yes.</p> <p>9 Q. To CO test?</p> <p>10 A. Yes.</p> <p>11 Q. And he was critical of those procedures.</p> <p>12 Is that correct?</p> <p>13 A. Yes.</p> <p>14 MR. HOWELL: Same objection.</p> <p>15 Q. (BY MR. CLARK) Did he tell you</p> <p>16 specifically what he disputed about those</p> <p>17 procedures?</p> <p>18 MR. HOWELL: Objection; form.</p> <p>19 THE WITNESS: Sorry. I'm getting thrown</p> <p>20 off.</p> <p>21 . When he came into town or when I had</p> <p>22 this conversation that prompted this e-mail?</p> <p>23 Q. (BY MR. CLARK) Well, when you had the</p> <p>24 conversation that prompted the e-mail.</p> <p>25 A. And what was the question again?</p> <p style="text-align: right;">[Page 76]</p>	<p>1 Sagecrest?</p> <p>2 MR. HOWELL: Objection; form.</p> <p>3 THE WITNESS: I -- I don't remember. I</p> <p>4 don't remember.</p> <p>5 Q. (BY MR. CLARK) Okay. Well, is it fair</p> <p>6 to say that with regard to your 3/14 e-mail, you</p> <p>7 were pretty upset with Mr. Kalsbeek?</p> <p>8 A. Yes.</p> <p>9 Q. And did you communicate the way you felt</p> <p>10 to Mr. Kalsbeek during this meeting the week</p> <p>11 after -- the next time Mr. Kalsbeek came into town?</p> <p>12 A. I had concerned -- I had talked to him</p> <p>13 regarding my concerns in this e-mail with him over</p> <p>14 the phone before he came in for the meeting. I</p> <p>15 believe he called me because I had been trying to</p> <p>16 call him to express my frustrations.</p> <p>17 Q. And so is it correct for me to conclude</p> <p>18 then that the e-mail to Sheila at the top of</p> <p>19 Exhibit 64, the first page of Exhibit 64, was a</p> <p>20 communication after you had this conversation with</p> <p>21 Mr. Kalsbeek?</p> <p>22 A. Are we looking at a different --</p> <p>23 Q. No. We're looking at 64.</p> <p>24 MR. ANDERSON: 64.</p> <p>25 THE WITNESS: Oh.</p> <p style="text-align: right;">[Page 78]</p>

[24] (Pages 75 to 78)

<p>1 A. Yes. 2 MR. ANDERSON: Are you -- 3 Q. (BY MR. CLARK) Somebody is telling you, 4 "Don't use the CO testing procedures from 5 Intermountain Gas." 6 Is that correct? 7 A. Yes. 8 Q. And who told you not to use those 9 procedures? 10 A. Jon. 11 Q. Okay. Do you recall if Mr. Drost and 12 Mr. Kalsbeek had any direct communication regarding 13 the testing procedures? 14 A. Regarding testing procedures? I don't 15 know. 16 Q. Was Mr. Drost at the meeting in March 17 with Mr. Kalsbeek regarding the CO testing 18 procedures? 19 A. No, he was not. 20 Q. Okay. But Mr. Drost was provided with a 21 copy of the CO testing procedures in Exhibit 53, 22 correct? 23 A. I don't know if he was copied on that or 24 not. 25 Q. Okay. Did you ever have a</p> <p style="text-align: right;">[Page 95]</p>	<p>1 response e-mail, "Does he understand that you were 2 doing it as Intermountain Gas had trained you?" 3 A. Yes. 4 Q. Okay. So did you have a discussion with 5 Mr. Drost about the distinction between the 6 procedures that Intermountain Gas had instructed 7 you to use and the procedures in Exhibit 53? 8 MR. ANDERSON: You mean outside of this 9 e-mail communication? 10 THE WITNESS: Yeah. 11 Q. (BY MR. CLARK) Yes. Did you have any 12 phone conversations with him? 13 A. Not that I can recall. 14 Q. Okay. Getting back to this bottom line, 15 I'm just trying to figure out who -- who made the 16 decision at First Rate Property Management to, 17 quote, do it Jon's way, end quote. 18 Was that your decision or did it come 19 from somebody else at First Rate Property 20 Management? 21 A. I was referring to "we" as in 22 First Rate. 23 Q. Is that including Mr. Drost? 24 MR. ANDERSON: Object to the form. 25 Q. (BY MR. CLARK) Well, when you're</p> <p style="text-align: right;">[Page 97]</p>
<p>1 conversation -- 2 Well, it appears in the exhibit we just 3 talked about, those e-mails -- 4 A. Uh-huh. 5 Q. -- that you were having a conversation 6 regarding those procedures with Mr. Drost. 7 Is that correct? 8 A. Yes. 9 Q. So would it be fair to say that 10 Mr. Drost was aware in March 2012 that the 11 procedures that the POA was directing you to follow 12 were different than those that Intermountain Gas 13 had trained you to use? 14 MR. ANDERSON: Objection. 15 MR. STACEY: Objection; form, foundation. 16 MR. ANDERSON: Lack of foundation. 17 He doesn't want you to speculate what 18 Tony Drost knew. 19 THE WITNESS: Am I supposed to answer? 20 Can you ask that again? I'm sorry. 21 MR. CLARK: Could you read that back, 22 Andrea? Sorry. 23 (Record read by reporter.) 24 THE WITNESS: I don't know that. 25 Q. (BY MR. CLARK) Well, he says in his</p> <p style="text-align: right;">[Page 96]</p>	<p>1 referring to First Rate, are you referring to 2 Mr. Drost as well? 3 MR. ANDERSON: Object to the form; vague, 4 lack of foundation, calls for a legal conclusion. 5 THE WITNESS: Do I answer? 6 Q. (BY MR. CLARK) You can go ahead and 7 answer, if you can. 8 A. I'm sorry. What was the -- 9 Q. Well, did you alone make the decision at 10 First Rate Property Management to deviate from the 11 direct -- the procedures provided by Intermountain 12 Gas? 13 I'm just trying to ask who made the 14 decision at First Rate Property Management to do it 15 Jon's way. 16 A. I think it was just an executive 17 decision. I don't think one specific person said, 18 "Yes. This is how we should be doing it." 19 Q. Okay. Who was involved in the executive 20 decision-making then? 21 A. I don't remember. 22 I know that me, Missy, and Sheila were 23 in this meeting with -- Jon and his wife, Virginia, 24 were in this meeting. 25 Q. Okay.</p> <p style="text-align: right;">[Page 98]</p>

[29] (Pages 95 to 98)

<p>1 THE WITNESS: I don't recall if I sent that 2 in an e-mail. Is there an e-mail that you're 3 referring to? 4 MR. ANDERSON: 41. Look at 41. 5 THE WITNESS: Oh, I found it. Here it is. 6 Q. (BY MR. PALMER) What is that exhibit 7 number, ma'am? 8 MR. ANDERSON: 41. 9 MR. PALMER: 41? Okay. 10 Q. (BY MR. PALMER) And who did you send 11 that e-mail to? 12 A. You're talking about the first one, the 13 bottom one? 14 Q. Yes, about the honey cones being broken. 15 A. Tony, Lizz, Marie, and Sheila. 16 Q. Okay. As you sit here today, was that 17 knowledge about the honey cone being broken 18 forwarded on to the POA? 19 A. I believe it was. 20 Q. But you don't recall any meetings or 21 discussions with the POA about water heaters being 22 modified and what to do about it? 23 A. I don't recall a specific 24 conversation -- 25 Q. Okay.</p> <p style="text-align: right;">[Page 239]</p>	<p>1 MR. ANDERSON: Yes, right here. We've got a 2 version without a sticker on it. Let me see if I 3 can find one -- 4 There you go. 5 THE WITNESS: Okay. 6 Q. (BY MR. PALMER) Did I understand you 7 correctly yesterday that that notice was only given 8 to tenants who had high readings of CO in their 9 apartment? 10 A. Correct. 11 Q. But your recollection is that was given 12 to the tenant in Apartment 4624 in March of 2012, 13 correct? 14 A. Yes. 15 Q. Okay. Was there any notification 16 complex-wide to the tenants that the complex was 17 having issues with carbon monoxide in their water 18 heaters besides Exhibit 14 that was given to some 19 tenants? 20 A. Not that I can recall. 21 Q. Can you tell me why that wasn't done? 22 A. I don't know. 23 Q. Did Mr. Kalsbeek ever tell you not to 24 notify the tenants of carbon monoxide issues? 25 A. Did he ever tell me not to alert the</p> <p style="text-align: right;">[Page 241]</p>
<p>1 A. -- about that. 2 Q. Do you know if those water heaters where 3 the honey cone was broken by Express Plumbing were 4 immediately replaced with new water heaters or not? 5 A. I don't recall. I don't recall. 6 Q. All right. 7 A. I don't know. 8 Q. Do you recall whether there were 9 discussions and a plan was put in place to replace 10 them right away because the honey cone was broken? 11 A. I don't recall having a conversation. 12 Q. Okay. 13 MR. PALMER: Are you ready or are you 14 just -- 15 MR. ANDERSON: I'm just trying to help her 16 get these -- 17 MR. PALMER: Sort documents? 18 MR. ANDERSON: I'm trying to get out ahead 19 of you. 20 Q. (BY MR. PALMER) Miss, I want you to look 21 at Exhibit 12 for me, too. Exhibit 12 for me. 22 That's the notice to the tenants. 23 MS. WILLMAN: You mean 14? 24 MR. PALMER: 14. Sorry. 25 THE WITNESS: Is that it right there?</p> <p style="text-align: right;">[Page 240]</p>	<p>1 tenants? 2 I know that he had told me not to give 3 out -- it was a piece of paper from the instruction 4 manual in the carbon monoxide detectors that we 5 were handing out with this letter, and it stated 6 different levels of CO levels and what the -- 7 what's the word I'm looking for -- symptoms were 8 experienced at those levels. 9 Q. Okay. 10 A. I know he specifically not -- told me 11 not to hand that out to the owners or the tenants. 12 Q. Did he give you a reason why? 13 A. There's documentation as -- as to why he 14 told me that, but I -- I don't recall off the top 15 of my head. 16 Q. Okay. 17 A. I don't know if it's here or not. 18 Q. We talked yesterday about how -- how at 19 least you didn't know exactly what the problem was, 20 what was causing the CO, correct? 21 A. Yeah. 22 Q. But you knew that the water heater was 23 involved, correct? 24 A. Yes. 25 Q. And you knew that every apartment</p> <p style="text-align: right;">[Page 242]</p>

[65] (Pages 239 to 242)

<p>1 A. I can't say for sure, but it appears as 2 if -- 3 Q. Okay. Now, getting back to the actual 4 testing, you described the testing procedure that 5 you and Missy performed. 6 Can you tell us which time you did that 7 same procedure where Missy would go in, run the hot 8 water, and then you would come in and put the wand 9 in the flue? 10 Did you do that every time you tested? 11 MR. ANDERSON: Every time she tested the 12 flue? 13 MR. HOWELL: Every time she tested for 14 carbon monoxide in a unit. 15 THE WITNESS: Anytime at all during my 16 duration at Sagecrest? 17 Q. (BY MR. HOWELL) Yes. 18 A. No. 19 Q. Okay. Did that change at some point? 20 Did your procedure change? 21 A. Yes. 22 Q. I think you testified yesterday that you 23 measured some -- or you took a measurement on the 24 kitchen counter. 25 Is that correct?</p> <p style="text-align: right;">[Page 283]</p>	<p>1 A. I'm sorry. Can you ask that again? 2 Q. Yeah. Well, in June 2012 when you 3 performed testing, did you test every unit that's 4 identified on Exhibit 59? 5 A. No, we did not. 6 Q. How do I know which ones you did test 7 and which ones you did not? 8 A. I guess you wouldn't. 9 Q. Can you tell me right now which ones you 10 did test and which ones you did not? 11 A. I don't recall. 12 Q. Do you have any notes from the testing 13 that took place in June 2012? 14 A. Not -- not that I can remember. 15 Q. Is there an update to Exhibit 59 that 16 you're aware of? 17 A. An updated spreadsheet? 18 Q. Yeah. Is there another one of these 19 spreadsheets that's floating around that has 20 entries or anything, any other additional data in 21 June -- the June 2012 or September 2012 columns? 22 A. Not that I know of. 23 Q. Okay. Do you know why there are zeros 24 in every column or every row for the June and 25 September columns?</p> <p style="text-align: right;">[Page 285]</p>
<p>1 A. Correct. 2 Q. Okay. So at what point did that change? 3 When did you start taking the measurement on the 4 kitchen counter? 5 And I know you already testified to 6 this. I apologize, but I can't remember the exact 7 date. 8 A. Jon had changed the procedures after our 9 testings in March, so the next time that we did the 10 filter changing, it looks like it was in June of 11 2012. 12 Q. And you're referring to Exhibit 59? 13 A. Yes. 14 Q. Okay. Now, Exhibit 59 has "Junc," and 15 the whole column is zero. 16 Did you perform testing in June 2012? 17 A. Yes. 18 Q. Okay. Did your readings -- were they 19 zero for every unit? 20 A. All the units that we had tested, they 21 came out as zero. 22 Q. Did you test every unit set forth on 23 Exhibit 59 -- 24 A. Every unit under -- 25 Q. -- in June 2012?</p> <p style="text-align: right;">[Page 284]</p>	<p>1 A. We had done samplings throughout the 2 complex, and every result yielded a zero when we 3 set the detector on the kitchen counter. 4 Q. Did that surprise you? 5 A. Did it surprise me that they were all 6 zeros? 7 Q. Yes. 8 MR. ANDERSON: Form. 9 Go ahead and answer. 10 THE WITNESS: No. 11 Q. (BY MR. HOWELL) Okay. Now, tell us 12 about the procedure and protocol that you used when 13 you changed your test results, when you started 14 testing on the kitchen counter. 15 Walk us through that. 16 MR. ANDERSON: You said changed the test 17 results. She followed new procedures. 18 MR. HOWELL: Thank you. 19 MR. ANDERSON: Okay. 20 MR. HOWELL: Better stated. 21 THE WITNESS: Okay. So I'm sorry. Can you 22 ask -- 23 MR. ANDERSON: Following the new procedures 24 Mr. Kalsbeek directed, tell him about those. 25 Q. (BY MR. HOWELL) Yeah. Let me get a</p> <p style="text-align: right;">[Page 286]</p>

[76] (Pages 283 to 286)

<p>1 you talked about some of the issues that were in 2 your first e-mail. I assume that you didn't use 3 the same terminology. 4 A. Correct. 5 Q. Okay. Can you tell us exactly what you 6 recall about that conversation with Mr. Kalsbeek. 7 A. I remember crying. 8 Q. Okay. 9 A. I told him I didn't think it was my 10 responsibility. 11 Q. To do what? 12 A. To be testing these, to be doing 13 anything to the water heaters. 14 Q. What did he say? 15 A. I don't remember what he said. I know 16 he had a way of calming me down. 17 I mean, I -- I don't remember exactly 18 what he said. 19 Q. Okay. Do you remember anything else 20 that was said by you or him in that conversation? 21 A. It looks like we talked about having a 22 meeting, according to the e-mail. I don't remember 23 him saying that, though. 24 Q. And I'm asking -- 25 I know you're looking at that first</p> <p style="text-align: right;">[Page 299]</p>	<p>1 that you've referred to as Jon's procedures or 2 Jon's way? 3 A. I -- I believe he did. 4 Q. Did you have any input in those 5 procedures as to creating them? 6 A. No. 7 Q. Did anybody at First Rate have any input 8 in -- 9 A. Not that I'm aware of. 10 Q. Did you talk to anybody at First Rate 11 with respect to those procedures? 12 A. I -- I don't remember. 13 Q. Is it possible that anybody at 14 First Rate had input in creating those procedures 15 and you just don't recall it? 16 MR. ANDERSON: Form. 17 THE WITNESS: I guess that's a possibility. 18 Q. (BY MR. HOWELL) Why is it that you think 19 that Mr. Kalsbeek drafted those procedures or 20 created those procedures? 21 A. Why do I think he created the 22 procedures? 23 Q. Yes. 24 A. Is this my professional -- not 25 professional. Is this my personal opinion?</p> <p style="text-align: right;">[Page 301]</p>
<p>1 e-mail or the -- 2 A. I'm trying to spark a memory. I 3 can't -- 4 Q. So sorry to interrupt you, but before 5 you do that, do you have an independent 6 recollection of what was said in that call other 7 than what might be referred to in the top e-mail? 8 A. No, I don't. 9 Q. Okay. 10 A. I don't remember. 11 Q. If you can look at Exhibit 65, please. 12 MR. ANDERSON: This one. 13 THE WITNESS: Okay. 14 Q. (BY MR. HOWELL) I just wanted to refer 15 to this document briefly where -- this is where you 16 testified about Jon's way, or sometimes you 17 referred to it as Jon's procedures -- 18 A. Uh-huh. 19 Q. -- in your testimony. 20 Do you recall that? 21 A. Yes. 22 Q. Okay. So I just want to talk about that 23 for a minute. 24 Is it -- is it your understanding that 25 Mr. Kalsbeek drafted and created the procedures</p> <p style="text-align: right;">[Page 300]</p>	<p>1 Q. Yeah. To your -- I'm asking you what 2 you think. 3 Your testimony is that he created the 4 procedures. I'm asking you what you base that on. 5 A. Oh, you're asking why I thought he 6 create -- what makes me think that he created 7 these? 8 Q. Correct. 9 A. He came into town when we had that 10 meeting and said, "This is what the procedures are 11 going to be." He laid them out for us. 12 Q. Did he say that he drafted them to you? 13 A. I don't recall him saying that. 14 Q. Did you utilize the procedures going 15 forward? 16 A. Yes. We were testing in the kitchen. 17 Q. Okay. Not just with respect to testing 18 in the kitchen but the rest of the procedures, did 19 you follow them? 20 A. Yes. 21 Q. Okay. Did you disagree with any of the 22 procedures? 23 A. I disagreed with testing in the kitchen. 24 Q. Did you voice that disagreement to 25 anybody?</p> <p style="text-align: right;">[Page 302]</p>

[80] (Pages 299 to 302)

<p>1 first page?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. Does that look like the CO</p> <p>4 procedures that you guys -- or that was put</p> <p>5 together in March of 2012?</p> <p>6 The document date there is March 21st,</p> <p>7 2012.</p> <p>8 A. Yes. Yeah, that looks like --</p> <p>9 Q. Okay.</p> <p>10 A. -- an outline of them.</p> <p>11 Q. Okay. And if you'll look at the top of</p> <p>12 this, in the middle paragraph it starts, "Attached</p> <p>13 are documents."</p> <p>14 This is from Jon -- or from Virginia and</p> <p>15 Jon to several First Rate -- to other board</p> <p>16 members. And he's letting them know that -- if you</p> <p>17 look at that middle paragraph, "These procedures</p> <p>18 were worked out with on-site managers, the</p> <p>19 maintenance supervisor, and Virginia and I."</p> <p>20 The on-site managers, after your</p> <p>21 testimony, I believe, was you and Missy?</p> <p>22 A. Hold on. I'm lost. Where are you</p> <p>23 reading that at?</p> <p>24 MR. ANDERSON: Yeah, I don't see that.</p> <p>25 MR. STACEY: It's in the middle paragraph,</p> <p style="text-align: right;">[Page 379]</p>	<p>1 procedures.</p> <p>2 Q. So at the top when Jon says, "These</p> <p>3 procedures were worked out with on-site managers,</p> <p>4 the maintenance supervisor, and Virginia and I," do</p> <p>5 you think that he was misstating the -- how these</p> <p>6 procedures were put in place or how they were</p> <p>7 created?</p> <p>8 A. I think he's making it sound like it</p> <p>9 wasn't just him that came up with them.</p> <p>10 Q. In the meeting --</p> <p>11 You were in the meeting when these</p> <p>12 procedures were talked about and, I guess, from</p> <p>13 your testimony that he put them together?</p> <p>14 A. Yes.</p> <p>15 Q. So how did this come about? He brought</p> <p>16 some documents, and then how were the procedures</p> <p>17 created?</p> <p>18 A. From what I remember, I think he already</p> <p>19 had something written out as to an idea; a rough</p> <p>20 draft, if you will, of what these were. Sheila</p> <p>21 kind of summarized them up here in this e-mail.</p> <p>22 Q. And on the next page, there's an e-mail</p> <p>23 from Sheila?</p> <p>24 A. It looks like it's the same --</p> <p>25 Q. I think it is the same. It is the same</p> <p style="text-align: right;">[Page 381]</p>
<p>1 start at "Attached."</p> <p>2 MR. ANDERSON: Right here. There you go.</p> <p>3 Read that paragraph.</p> <p>4 THE WITNESS: Okay.</p> <p>5 Q. (BY MR. STACEY) It's the last sentence.</p> <p>6 A. Okay.</p> <p>7 Q. So would the on-site managers be you and</p> <p>8 Missy?</p> <p>9 A. Correct.</p> <p>10 Q. And the maintenance supervisor was</p> <p>11 Sheila Thomason?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. And the second half of this page,</p> <p>14 the e-mail from Sheila to Lizz and Tony Drost and,</p> <p>15 it looks like, Sagecrest and Jon and Virginia,</p> <p>16 airel, she states, "Attached is the paperwork Jon</p> <p>17 brought in regarding carbon monoxide. Below is</p> <p>18 what I have for the procedures."</p> <p>19 Your testimony earlier was that Jon</p> <p>20 drafted these procedures. Does this ring any bells</p> <p>21 for you? Does it make you rethink how the</p> <p>22 procedures were created?</p> <p>23 A. Jon, I believe, drafted the actual sheet</p> <p>24 that says "Procedures" at the top. Sheila was just</p> <p>25 summarizing what Jon had discussed to be the</p> <p style="text-align: right;">[Page 380]</p>	<p>1 one.</p> <p>2 A. -- e-mail. Okay.</p> <p>3 Q. And she's stating that, "Below is what I</p> <p>4 have for the procedures," so --</p> <p>5 MR. ANDERSON: Can she take a look at this?</p> <p>6 MR. STACEY: Yeah.</p> <p>7 THE WITNESS: Okay. I'm sorry. Was there a</p> <p>8 question?</p> <p>9 Q. (BY MR. STACEY) No.</p> <p>10 And your testimony is that Jon created</p> <p>11 the procedures?</p> <p>12 A. I believe he did.</p> <p>13 Q. Was there any input from any of the</p> <p>14 First Rate employees?</p> <p>15 A. Not that I recall.</p> <p>16 Q. Okay. And if you'll look at the</p> <p>17 procedures --</p> <p>18 And this is Exhibit 53.</p> <p>19 MR. ANDERSON: Let's go with these.</p> <p>20 Q. (BY MR. STACEY) Were these the</p> <p>21 procedures that were in place up until</p> <p>22 November 12th, 2012?</p> <p>23 A. Starting in -- starting after</p> <p>24 March 20th.</p> <p>25 Q. Okay. And these had not been changed?</p> <p style="text-align: right;">[Page 382]</p>

[100] (Pages 379 to 382)

<p>1 Plumbing to First Rate Property Management after 2 McQuen was killed on November 10th. I think it was 3 November 16th. There's a reference to a prior bid 4 in that e-mail from Express Plumbing. 5 Do you recall seeing that e-mail? 6 MR. ANDERSON: The first e-mail you 7 mentioned or the second? 8 MR. CLARK: The second e-mail, the 9 November 16th e-mail. 10 MR. ANDERSON: Is that what we just saw? 11 MR. CLARK: No. I'm just asking her if she 12 recalls. 13 MR. ANDERSON: Don't speculate. 14 Q. (BY MR. CLARK) If you don't -- 15 A. I don't -- I don't know. 16 Q. Do you believe, as you sit here today, 17 that there was another written estimate from 18 Express Plumbing regarding an estimate for -- or a 19 bid for carbon monoxide testing? 20 MR. ANDERSON: Object to the form. 21 THE WITNESS: I think that there was, but I 22 don't know for sure. 23 Q. (BY MR. CLARK) Okay. That's fair. 24 Thank you. 25 Let me take you to Exhibit 53.</p> <p style="text-align: right;">[Page 431]</p>	<p>1 the water heater to turn on? 2 A. Correct. 3 Q. So when you go into an apartment to 4 test, according to this protocol, you don't know if 5 the water heater has been off for days, do you? 6 A. I -- I don't. 7 Q. Okay. There's no way for you to know 8 that? 9 A. Uh-huh, yeah. 10 Q. And there was no direction as to closing 11 windows or turning on vents or shutting vents or 12 shutting doors, anything like that? 13 A. No. 14 Q. Just set the machine up on the kitchen 15 table and then go do your filter change. 16 Is that correct? 17 A. Correct. 18 Q. Okay. It also says to, "Check the area 19 around the water heater, inspect and clean." 20 A. (Witness indicates.) 21 Q. Did you go through that protocol as 22 well? 23 A. Yes. 24 Q. Okay. Let me have you look at 25 Exhibit 59, which you just looked at a minute ago.</p> <p style="text-align: right;">[Page 433]</p>
<p>1 Mr. Howell went through these testing procedures 2 with you, but I still have a few questions, if you 3 don't mind. 4 With regard to -- and it's been referred 5 to, the testing -- testing procedures as Jon's way, 6 which I understand to be where the detector is 7 placed in the kitchen or in the unit somewhere on 8 the kitchen counter. 9 In looking at Exhibit 53, when you went 10 into an apartment to test according to the carbon 11 monoxide procedures revised on March 20, 2012, was 12 there a set of steps that you would take? 13 Would you open the windows, for example? 14 Would you close the windows, for example? What 15 would you do? 16 Just walk me through like I'm your 17 shadow. 18 A. No. There was -- there was no direction 19 as to open, turn on, close, nothing like that. 20 Q. Okay. And I also understand that 21 there's no direction to even activate or turn on 22 the water heater. 23 Is that correct? 24 A. Correct. 25 Q. So you're not running hot water to get</p> <p style="text-align: right;">[Page 432]</p>	<p>1 I'm sorry to be repetitive. 2 When I was asking you questions 3 concerning this document yesterday, I was under the 4 impression, looking at June 12th and 5 September 12th, that those zeros indicated that 6 there was actual testing done in that particular 7 apartment. 8 A. (Witness indicates.) 9 Q. Was I incorrect? 10 A. Yes. 11 Q. Okay. Now, is there any way to tell 12 whether in Apartment 4624 where McQuen died whether 13 there was CO testing done in June 2012? 14 A. I don't recall specifically. 15 Q. Okay. Same question for September 2012. 16 A. I don't recall specifically. 17 Q. Are there any documents that were 18 created by you or anyone at Sagecrest to confirm 19 what particular apartments were tested in 20 June 2012? 21 A. I don't recall. 22 Q. Okay. Can you give me an estimation, 23 best guess, of how many water heaters were actually 24 tested in June of 2012? 25 MR. ANDERSON: Object to the form. The</p> <p style="text-align: right;">[Page 434]</p>

[113] (Pages 431 to 434)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 7th day of January 2014.



ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.



My Commission Expires: 2-14-17

[Page 491]

15

From: 'sagecrest' <sagecrest@frpmrentals.com>
To: lizz@frpmrentals.com<lizz@frpmrentals.com>; Sheila
Thomason<Sheila@FRPMRENTALS.COM>;
Marie<Marie@frpmrentals.com>
Sent: Wednesday, March 14, 2012 12:37 PM
Subject: water heater testing

Hm Jon is ignoring my phone calls. I'm going to send him this email..
i'm fucking done with him. He told Chris everyone's pissed off at me for having water heaters replaced that didnt need it... i dont know how he knows that.... let me know if i shouldnt send this im fucking heated
right now

Hi Jon,

I heard that there were a bunch of owners that were pissed off at me. I dont think that testing the water heaters for CO every 3 months should fall under my responsibility. It never should have been my responsibility. I met with Intermountain Gas and Express Plumbing, you did not. They trained me on how to test the water heaters and I did it according to their instructions. I am to be putting it in the flue. You were not here with me for that training. You can call Intermountain Gas and Express and confirm that I am doing it correctly.

When I have Intermountain Gas here telling me I have lives that I am responsible for and how dare I go the weekend without having all these water heaters replaced and how big of a liability it is for ME... then owners on the other hand who are pissed off at me... I cant do it. It shouldnt be my responsibility to begin with. They can be pissed off at me all they want but tell me what you would do. Lives or money? If the reading goes over 50 Intermountain Gas will red tag it and shut the water heater down. Go ahead and call them and confirm that with them.

I'm not going to be testing these anymore. I recommend putting CO combo detectors in every unit and be done with it. If one goes off the people will call Intermountain Gas and they can come out and red tag the water heater and we can go from there.

Thank You,
Tara

--

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16

From: 'sagecrest' <sagecrest@frpmrentals.com>
To: Lizz<lizz@frpmrentals.com>
CC Recipients: Sheila
Sent: Wednesday, March 14, 2012 4:09 PM
Subject: Re: water heater testing

I'm pretty much. Just had a minor melt down with him on the phone. Told him owners would really be mad at me if i let their tenants die and they couldnt pay rent next month

Tara Gaertner
Sagecrest Apartments
First Rate Property Management
P: (208) 514-4304
F: (208) 884-3487
www.sagecrestapts.com

On 3/14/2012 2:53 PM, Lizz wrote:
> So no need to revise your email? Did you just read it to him????
> Lizz Loop, MPM&A, RMP&A
> General Manager
> First Rate Property Management, Inc. CRM&A
> (208) 577-5202 â€" direct line
>
>

> ----- Original Message -----
> From: "sagecrest" <sagecrest@frpmrentals.com>
> To: "Lizz" <lizz@frpmrentals.com>
> Cc: "Sheila Thomason" <Sheila@FRPMRENTALS.COM>; "Marie"

> <Marie@frpmrentals.com>
> Sent: 3/14/2012 1:06:40 PM
> Subject: Re: water heater testing
>> I'm on the phone with him. He'll be in town next week btw.
>> Tara Gaertner Sagecrest Apartments First Rate Property Management P:
>> (208) 514-4304 F: (208) 884-3487
>> www.sagecrestapts.com
>>

>> On 3/14/2012 12:50 PM, Lizz wrote:
>>> I wouldn't send this. Is it okay if I make some changes and forward
>>> it back to you? Lizz Loop, MPM&A, RMP&A General Manager First Rate
>>> Property Management, Inc. CRM&A (208) 577-5202 â€" direct line
>>>

>>> ----- Original Message ----- From: "sagecrest"
>>> <sagecrest@frpmrentals.com> To:
>>> "lizz@frpmrentals.com"
>>> <lizz@frpmrentals.com>; "Sheila Thomason"
>>> <Sheila@FRPMRENTALS.COM>; "Marie"
>>> <Marie@frpmrentals.com> Sent:
>>> 3/14/2012 12:37:17 PM Subject: water heater testing
>>>> Hm Jon is ignoring my phone calls. I'm going to send him this
>>>> email.. i'm fucking done with him. He told Chris everyone's pissed
>>>> off at me for having water heaters replaced that didnt need it... i
>>>> dont know how he knows that.... let me know if i

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shouldnt send this
>>>> im fucking heated right now
>>>>
>>>> Hi Jon, I heard that there were a bunch of owners
that were pissed
>>>> off at me. I dont think that testing the water
heaters for CO every
>>>> 3 months should fall under my responsibility. It
never should have
>>>> been my responsibility. I met with Intermountain
Gas and Express
>>>> Plumbing, you did not. They trained me on how to
test the water
>>>> heaters and I did it according to their
instructions. I am to be
>>>> putting it in the flue. You were not here with me
for that
>>>> training. You can call Intermountain Gas and
Express and confirm
>>>> that I am doing it correctly. When I have
Intermountain Gas here
>>>> telling me I have lives that I am responsible for
and how dare I go
>>>> the weekend without having all these water heaters
replaced and how
>>>> big of a liability it is for ME... then owners on
the other hand
>>>> who are pissed off at me... I cant do it. It
shouldnt be my
>>>> responsibility to begin with. They can be pissed
off at me all they
>>>> want but tell me what you would do. Lives or money?
If the reading
>>>> goes over 50 Intermountain Gas will red tag it and
shut the water
>>>> heater down. Go ahead and call them and confirm
that with them. I'm
>>>> not going to be testing these anymore. I recommend
putting CO combo
>>>> detectors in every unit and be done with it. If one
goes off the
>>>> people will call Intermountain Gas and they can
come out and red
>>>> tag the water heater and we can go from there.
Thank You, Tara --
>>>> Tara Gaertner Sagecrest Apartments First Rate
Property Management
>>>> P: (208) 514-4304 F: (208) 884-3487
www.sagecrestapts.com
>>>>
>

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000445

17

From: 'sagecrest' <sagecrest@frpmrentals.com>
To: Sheila Thomason<Sheila@FRPMRENTALS.COM>;
lizz@frpmrentals.com<lizz@frpmrentals.com>
Sent: Monday, March 12, 2012 9:13 AM
Subject: Fwd: Re: WH CO Levels

Just FYI there's about to be a shit storm....

Tara Gaertner
Sagecrest Apartments
First Rate Property Management
P: (208) 514-4304
F: (208) 884-3487
www.sagecrestapts.com

----- Original Message -----
Subject: Re: WH CO Levels
Date: Mon, 12 Mar 2012 09:13:24 -0600
From: sagecrest <sagecrest@frpmrentals.com>
To: VJK <aire1@pacbell.net>

Jon,

I am not going to go rounds on this with you. I was here with a safety manager from Intermountain Gas and Ben with Express Plumbing when they trained me on what to do. I am to be testing in the flu and going off of that number and chart. Anything tested over 50 Intermountain Gas would red tag the water heater, shut it off and not turn it back on until it was either A) cleaned or B) replaced. For Express to clean the water heaters is about half the cost of replacing it. There is no guarantee how long it will last after they clean it. If they happen to break the honey comb while they are cleaning it then it will have to be replaced. Bruce Cooper decided to have his cleaned after it tested high in August. After cleaning the level went back down to 15ppm. On Friday it tested above 50. So now I have the pleasure of calling him and telling him it either needs to be cleaned again or replaced. This proves that cleaning it is basically a waste of money and is a temporary fix. If you are doubting what I have been doing ever since August then I would be happy to call Intermountain Gas out here for a confirmation. The information on the chart I sent you was shared with all the owners in August when all this started happening. It is also in the directions to the CO detectors that were sent to tenants with higher readings. I am not going to withhold important information from owners when it comes to their tenant's health. This is a very important issue that needs to be taken care of properly. If Intermountain Gas came out and tested your water heater in 3724 they would red tag it. Please let me know what you would like me to do.

Thank you,
Tara

Tara Gaertner
Sagecrest Apartments
First Rate Property Management
P: (208) 514-4304

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FR00737

000447

F: (208) 884-3487
www.sagecrestapts.com

On 3/9/2012 7:21 PM, VJK wrote:

Tara, Please do not send this info out to owners or tenants, it is not relevant to the levels of CO in the flue, the info sent refers to the exposure levels in a room over a period of time and what symptoms would occur. This info applies to symptoms of CO poisoning not the levels in the flue and are not the levels in the apartment unit.

A CO detector is activated at 70 ppm, this would be room CO level.

You are correct about the 100ppm as a guideline for WH flue, this does not necessarily require the WH to be replaced if above 100ppm. The level can be as high as 300ppm before mandatory replacement is suggested. The WH should be cleaned, the air intake area and screening. If this does not correct the levels to within acceptable levels, then further action maybe required. When this issue was first addressed, the attached spreadsheet was produced - the spreadsheet shows WH's under 300ppm should be cleaned - not replaced.

Please keep this issue in prospective for both owners and tenants, we do not want a health hazard nor do we want to do replacements and increased costs for owners when not necessary.

☺Virginia and Jon☺

--- On Fri, 3/9/12, sagecrest <sagecrest@frpmrentals.com> wrote:

From: sagecrest <sagecrest@frpmrentals.com>
Subject:
To: "John and Virginia" <aire1@pacbell.net>
Date: Friday, March 9, 2012, 1:02 PM

-- Tara Gaertner
Sagecrest Apartments
First Rate Property Management
P: (208) 514-4304
F: (208) 884-3487
www.sagecrestapts.com

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18

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)
HYMAS, individually and as)
the natural parents of)
PRIVATE FIRST CLASS McQUEN C.)
FORBUSH, USMC (Deceased),)
and BREANNA HALOWELL,)

Plaintiffs,)

vs.)

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY)
OWNERS' ASSOCIATION, INC., an)
Idaho non-profit corporation,)
d/b/a SAGECREST MULTIFAMILY)
PROPERTY OWNERS' ASSOCIATION,)
et al.,)

Defendants.)

DEPOSITION OF ROBERT PETERSON

December 5, 2013

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

<p>1 MR. TRIPP: I'll object to foundation also. 2 MS. MILLER: Join. 3 MR. THOMAS: I'm not instructing him not to 4 answer. I'm just saying let's do it carefully, 5 Counsel. 6 Go ahead. 7 Q. (BY MR. MILLS) Same question. 8 A. Okay. E, "If the tester reading is 9 30 parts per million or above in the room, a proper 10 test shall be conducted in the flue of the water 11 heater." 12 THE REPORTER: I'm sorry. Slow down a 13 little bit. 14 THE WITNESS: Okay. 15 It talks about turning on all hot water 16 in the apartment so the water heater can turn on 17 and reach operating temperature, reset the tester 18 to zero to make sure the water heater runs 19 approximately five minutes. 20 They're checking -- 21 Q. (BY MR. MILLS) And just to slow down for 22 the court reporter, she's trying to take down 23 everything you say -- 24 A. Okay. 25 Q. -- and you read that pretty quickly.</p> <p>[Page 78]</p>	<p>1 A. If it's in -- in the flue, it's 2 different than being in the atmosphere of the 3 structure. 4 Q. All right. Let's start with 5 paragraph A. It says, "These procedures shall be 6 followed for detecting CO, carbon monoxide, levels 7 in units." 8 A. Okay. 9 Q. Paragraph A, "Air filters shall be 10 changed monthly by 10 to 12 buildings at a time 11 starting April 2012." 12 Do you take any issue with changing of 13 air filters in apartments on a monthly basis? 14 A. No, I do not. 15 Q. Paragraph B, "During filter changes, the 16 carbon monoxide detector testing unit shall be 17 turned on prior to entering each unit." 18 Do you take issue with turning on the CO 19 detector before entering the unit? 20 A. I have no -- 21 As long as they know how to use it 22 properly, no. 23 Q. Okay. Then it says, "Turned on" -- 24 I should have finished the sentence. It 25 says, "During filter changes, the carbon monoxide</p> <p>[Page 80]</p>
<p>1 A. Okay. 2 Q. So you would take issue with something 3 in E. 4 Any other sections of this document that 5 you -- that jump out at you as creating issues? 6 A. Actually, E is not so much a problem as 7 D. "Once the filter and water heater areas are 8 completed, the tester shall be read. If the 9 reading is below 30 parts per million, no further 10 action is required." 11 Q. Why do you take issue with paragraph D, 12 which you just read? 13 A. Because if there's more than 30 parts 14 per million in the structure, then that appliance 15 needs to be shut off and taken out of service until 16 it can be repaired. 17 Q. All right. 18 A. It's talking in the -- 19 Now, like I say, it's pretty broad. 20 This first section -- A, B, C, and D -- is it 21 talking in the flue gases or is it talking in the 22 atmosphere of the structure? 23 Q. I -- 24 A. It's unclear. 25 Q. So to you, it's unclear?</p> <p>[Page 79]</p>	<p>1 detector testing unit shall be turned on prior to 2 entering each unit, warmed up, and set to zero." 3 What does that mean to you to be set to 4 zero? 5 A. That means that anytime you use a carbon 6 monoxide detector, or at least the type we use and 7 the ones I'm familiar with, you turn them on and 8 get them ready to go in an atmosphere that's clean 9 outside. You don't want to turn it on in the 10 structure you're testing because it doesn't have a 11 baseline to start from. 12 So you're actually what they call 13 zeroing it out -- the term is "zeroing it out" -- 14 before you enter the building in a clean atmosphere 15 and then go inside and see if there's a difference 16 between outside and inside. 17 Q. So turning it on prior to entering the 18 unit and setting it to zero would be appropriate? 19 A. That is what our service technicians do, 20 yes. 21 Q. Paragraph B then goes on to say, "Once 22 in the unit, the tester shall be set on the kitchen 23 counter sampling the air in the hall and the living 24 room." 25 Is that an appropriate procedure for</p> <p>[Page 81]</p>

[21] (Pages 78 to 81)

<p>1 testing for carbon monoxide in an apartment?</p> <p>2 A. That is not our procedure. Our</p> <p>3 procedure would be to measure carbon monoxide in</p> <p>4 each room at the highest level and move throughout</p> <p>5 the structure.</p> <p>6 Q. And where in the room would you take</p> <p>7 measurements?</p> <p>8 A. Everywhere: The entire structure of the</p> <p>9 home or the apartment.</p> <p>10 Q. Would --</p> <p>11 A. As much as you could get access to.</p> <p>12 Q. Do you take them in the center of the</p> <p>13 room? On the floor? Near the ceiling?</p> <p>14 A. Yes, all of them.</p> <p>15 Q. Okay. Is the tester designed in such a</p> <p>16 way that you can just walk around and let it sample</p> <p>17 and watch readings change?</p> <p>18 A. Yes. Ours are. I don't know what</p> <p>19 they're using here.</p> <p>20 Q. Okay.</p> <p>21 A. Ours are.</p> <p>22 Q. Paragraph C says, "During the time of</p> <p>23 testing, the filter shall be changed, the area</p> <p>24 around the water heater inspected and cleaned if</p> <p>25 necessary."</p> <p style="text-align: right;">[Page 82]</p>	<p>1 Intermountain Gas' procedures for testing CO?</p> <p>2 A. Yes.</p> <p>3 Q. Why?</p> <p>4 A. Because 30 parts per million, even over</p> <p>5 time, is dangerous and because any vented appliance</p> <p>6 should not emit any CO into the atmosphere of a</p> <p>7 structure, especially after it's warmed up, once</p> <p>8 it's got the vent warm.</p> <p>9 Q. It's my understanding that when a water</p> <p>10 heater kicks on that the carbon monoxide gases</p> <p>11 don't always directly go up the vent and there</p> <p>12 might be a little spillage.</p> <p>13 Is that accurate?</p> <p>14 A. There may be if the flue is not warmed</p> <p>15 up, if the vent is not warm. For hot air to go up</p> <p>16 a cold vent, it's usually a couple of minutes, and</p> <p>17 they should -- they should be drafting properly.</p> <p>18 Q. When Intermountain Gas tests a water</p> <p>19 heater in an apartment or a house, explain the</p> <p>20 procedure.</p> <p>21 A. When they -- when they turn on a water</p> <p>22 heater, they'll observe the flame to see if there's</p> <p>23 anything obvious because a flame can tell you if</p> <p>24 there's a problem or not.</p> <p>25 If there's not enough combustion air</p> <p style="text-align: right;">[Page 84]</p>
<p>1 Is that part of Intermountain Gas'</p> <p>2 procedure for checking water heaters?</p> <p>3 A. No. We do not clean or work on any</p> <p>4 equipment.</p> <p>5 Q. Do you take issue with that paragraph?</p> <p>6 A. The only thing I -- I would like</p> <p>7 clarification if I was reading this is what filter</p> <p>8 are they talking about because there's a couple</p> <p>9 of -- you know, there's the intake on a water</p> <p>10 heater that may be construed as a filter, and then</p> <p>11 there's a filter on the heating unit that pulls air</p> <p>12 in. Which filter are they talking about?</p> <p>13 Q. Paragraph D states, "Once the filter and</p> <p>14 water heater areas are completed, the tester shall</p> <p>15 be read. If the reading is below 30 PPM, no</p> <p>16 further action is required."</p> <p>17 What do you understand that paragraph to</p> <p>18 mean?</p> <p>19 A. That -- to me, that paragraph means that</p> <p>20 if they -- if after working on the equipment, they</p> <p>21 have a reading of 30 parts per million or less,</p> <p>22 then no further action is needed. And that would</p> <p>23 not be -- that would not be something that we</p> <p>24 would -- that we would recommend.</p> <p>25 Q. Would that be in violation of</p> <p style="text-align: right;">[Page 83]</p>	<p>1 getting to it, it will -- it will roll out or roam</p> <p>2 around. It will try looking for air. It will also</p> <p>3 burn yellow. You'll see a lazy yellow flame.</p> <p>4 That's one thing they look for.</p> <p>5 They'll also -- if it's a natural draft</p> <p>6 appliance, as these water heaters were, they'll</p> <p>7 check at the flue to make sure that vent gases are</p> <p>8 not down drafting rather than going up the chimney.</p> <p>9 And it's as simple sometimes as putting your hand</p> <p>10 up there. You can feel it or you can light a match</p> <p>11 and blow it out and it will pull the smoke up.</p> <p>12 It's a pretty simple test.</p> <p>13 Or you can use your CGI that we carry on</p> <p>14 emergency orders and may test that, the actual vent</p> <p>15 gas or flue to see if there's anything coming out</p> <p>16 of it right at the appliance.</p> <p>17 Q. Okay. When they enter an apartment, do</p> <p>18 they have to turn the water heater on first?</p> <p>19 A. No. There's no specific -- specified</p> <p>20 order on turning gas appliances on.</p> <p>21 Q. Would you go around the apartment and</p> <p>22 test the air without turning on the water heater?</p> <p>23 A. On a CO call where they've called</p> <p>24 expressing concern on CO?</p> <p>25 Q. Yes.</p> <p style="text-align: right;">[Page 85]</p>

[22] (Pages 82 to 85)

<p>1 A. Yes. We would be checking it before we 2 even entered. We would check the atmosphere as we 3 entered. 4 Q. Okay. And then -- 5 A. It may already be on. 6 Q. Presuming that the -- that the air tests 7 zero, the water heater is off, what would be the 8 next step if Intermountain Gas were called to -- on 9 a CO call to check a water heater? 10 A. In a building where the water heater was 11 the only appliance, it would be to light the 12 appliance and check the proper operation. 13 Q. Okay. 14 A. See how it was -- see how it was 15 working. 16 Q. And when you say "light the appliance," 17 what do you mean? 18 A. Means light the pilot on the appliance 19 and turn the thermostat up and observe how it 20 functions. 21 Q. Would you turn on water and let water 22 run to allow the device to activate? 23 A. It depends on whether the water heater 24 was up to temperature or not already. If it -- 25 depends how long it had been off.</p> <p style="text-align: right;">[Page 86]</p>	<p>1 Q. Okay. Paragraph E -- 2 Well, before we leave D, do you have any 3 other critiques regarding paragraph D? 4 A. No. 5 Q. Paragraph E states, "If the testing 6 reading is 30 parts per million or above in the 7 room, a proper test should be conducted in the flue 8 of the water heater. Be sure to turn on all hot 9 water in the apartment so water heater can turn on 10 and reach operating temperature. Reset the tester 11 to zero and make sure the water heater runs 12 approximately five minutes prior to testing the air 13 in the flue." 14 Do you have any critique regarding that 15 paragraph or comment? 16 A. Well, my first thing is, again, if the 17 tester is reading 30 parts per million or above in 18 the room, there really should not be a limit to the 19 threshold that that is -- 20 If you're getting any reading in the 21 room is when you should be checking the appliance. 22 Again, it talks about turning on hot 23 water to the apartment so the water heater can turn 24 on and that depends on the state the water heater 25 is in when you get there and the temperature of the</p> <p style="text-align: right;">[Page 88]</p>
<p>1 But normally if it's sitting there for 2 several hours, you could turn the thermostat up. 3 You probably wouldn't have to turn water on to make 4 it activate. 5 Q. If the thermostat were already set to 6 maximum, what would be the -- and the water heater 7 was off, what would you do? 8 A. Again, it depends on how long the water 9 heater was off and what the temperature of the 10 water heater -- and the water in the water heater 11 was. 12 If the water was already hot and it had 13 only been off a few minutes, then you'd have to run 14 water to drop the temperature of the water to make 15 it come on. But if the water heater is off when we 16 arrive, normally that water is cool enough that the 17 thermostat will turn it on just by turning it up. 18 Q. Presuming it's not all the way up 19 already? 20 A. But it doesn't have to be up all the 21 way. It can be just above the temperature in the 22 water, the temperature of the water in the tank. 23 Q. But if it's already turned all the way 24 up, you can't turn it up any further, correct? 25 A. That's correct, yeah.</p> <p style="text-align: right;">[Page 87]</p>	<p>1 water in the tank. It may not be necessary. 2 Resetting the tester to zero, you 3 shouldn't have to do that. It's been zeroed 4 outside. You're taking constant readings inside 5 that, whether it be at the flue or in the 6 structure. 7 The only thing that I see that -- you 8 know, run the appliance approximately five minutes 9 prior to testing, that's -- that's a good amount of 10 time to get that flue warm. 11 Q. So you would agree that that's a good -- 12 A. I would say that E would not follow 13 Intermountain Gas. That last sentence is probably 14 a good idea, but the rest of that would not follow 15 anything that our technicians are trained to do. 16 Q. And when you say the "last sentence," 17 you mean the last part of the last sentence. 18 Is that correct? 19 A. Letting it run for five minutes before 20 testing the air in the flue. 21 So it sounds like they're actually 22 testing the vent gas in the flue. That is -- 23 that's a -- 24 You know, there is no industry standard 25 for how long you let one run before it vents</p> <p style="text-align: right;">[Page 89]</p>

[23] (Pages 86 to 89)

<p>1 properly, but you do let them run two or three 2 minutes before you check it. 3 Q. Is that the appropriate place to take 4 that reading in the flue? 5 A. You can. You can -- you can tell some 6 things from it. It doesn't tell you everything. 7 Our service techs currently do not do 8 that on every turn-on. They check to see if it's 9 spilling, but they do not currently check inside 10 the flue on every appliance they turn on. 11 They may, if we have a carbon monoxide 12 incident, check it. But you have to be careful 13 doing that with the instruments because it's very 14 hot and it can actually -- if you don't have the 15 right equipment protecting your instrument, it will 16 actually -- that hot air will ruin it. So it's not 17 a standard practice to do it on all of them -- 18 Q. Okay. 19 A. -- for us. 20 Q. So if an Intermountain Gas technician 21 goes out on a water heater call and they test and 22 find that there's any carbon monoxide in the room, 23 is it proper procedure for Intermountain Gas to red 24 tag that water heater? 25 A. It is if that water heater is the cause.</p> <p style="text-align: right;">[Page 90]</p>	<p>1 Q. Have you ever been to Sagecrest 2 Apartments? 3 A. I have not. 4 Q. Have you looked at any photographs 5 regarding Sagecrest Apartments in preparation -- 6 A. The only one I can think of that I saw 7 was one that Jim Stattner sent me after the 8 October 10th event, the one that's mentioned in -- 9 in the -- in the order that he took a picture. And 10 that was a long time ago. 11 Q. All right. There's no -- 12 This is a second-floor apartment. 13 A. Uh-huh. 14 Q. There's no garage. There's no cars. 15 There's -- 16 A. Okay. 17 Q. -- one natural gas appliance in the 18 apartment. We're talking about a water heater. 19 A. Okay. 20 Q. Just to kind of shorten this up, let's 21 focus on water heaters in an apartment -- 22 A. Okay. 23 Q. -- okay? 24 The first sentence in paragraph B says, 25 "If the tester reading is above 30 PPM in the room,</p> <p style="text-align: right;">[Page 92]</p>
<p>1 Q. Okay. Let's presume that there's no 2 other -- for the rest of our discussion -- 3 A. Okay. 4 Q. -- let's presume that there are no other 5 natural gas burning appliances in the apartment. 6 We're only talking about a water heater. 7 A. Okay. What it is standard to do is 8 trace it to its source. Probably -- I don't have a 9 specific number, but probably two-thirds of the CO 10 calls we go on are not even natural gas related. 11 They're -- somebody started a car in the garage or 12 burning candles or barbecuing inside the house. I 13 mean, you wouldn't believe what we find out there a 14 lot of times. Probably half of them are due to 15 cars actually warming up in the garage and they 16 didn't pull them out far enough. 17 So if it is the only appliance, they 18 would certainly do an investigation on that 19 appliance, and if they found that appliance to be 20 the cause of the carbon monoxide, they would red 21 tag it. 22 Q. Okay. 23 A. But if there's another cause -- 24 It doesn't have to be a natural gas 25 appliance is all I'm saying.</p> <p style="text-align: right;">[Page 91]</p>	<p>1 a proper test shall be conducted in the flue of the 2 water heater." 3 If you have any understanding, what's 4 your understanding as to a proper test versus an 5 improper test? 6 MR. TRIPP: Objection; foundation. 7 MS. MILLER: Join. 8 THE WITNESS: We do not have any terminology 9 in our procedure about a proper test. 10 Like I said, if the reading is above 11 zero, we're going to investigate fully and shut 12 that piece of equipment off if it is what is 13 producing CO. 30 parts per million is not a 14 threshold for us in regard to red tagging or 15 shutting off a piece of equipment. 16 Q. (BY MR. MILLS) So if I understand you 17 correctly, if any CO is found in an apartment and 18 the water heater is the only source of that CO, 19 would it be Intermountain Gas' procedure to red tag 20 that water heater? 21 A. It would be our procedure to red tag 22 that water heater if it was the only appliance and 23 it was deemed the source. I want to make that 24 clear. I don't want to separate. Because we -- 25 If we go into an apartment where there</p> <p style="text-align: right;">[Page 93]</p>

[24] (Pages 90 to 93)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 14th day of December, 2013.



ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.



My Commission Expires: 2-14-17

[Page 134]

From: 'newsagecrest' <sagecrest@frpmrentals.com>
To: Carl<tara@frpmrentals.com>
Sent: Friday, December 07, 2012 8:56 AM
Subject: Fw: Re: Fw: Good Morning! Questions???

----- Forwarded Message -----

From: "sagecrest" <sagecrest@frpmrentals.com>
To: "Lizz" <lizz@frpmrentals.com>
Sent: 5/21/2012 1:36:20 PM
Subject: Re: Fw: Good Morning! Questions???

Wow. I have a whole lot to say about this but I just did renewals and I'm tired of typing and tired of him. I don't even care. Whatever, we suck Jon. You're right. We can't do anything right. I have an attitude towards him because he's a fucking asshole and created a hostile work environment. And he's stupid and ignorant. Go ahead and tell him that. He can have attitude towards us and can talk to us however he wants. That's cool. Whatever.

*Tara Gaertner
Sagecrest Apartments
(208) 514-4304
frpmrentals.com*

----- Original Message -----

From: "Lizz" <lizz@frpmrentals.com>
To: "Sagecrest" <Sagecrest@frpmrentals.com>
Sent: 5/21/2012 1:24:51 PM
Subject: Fw: Good Morning! Questions???

I have to reply today so if I call you for questions you will know why.

No matter what no responding. A lot has to do with POA stuff that I have to look up.

*Lizz Loop, MPM[®], RMP[®]
General Manager*

*First Rate Property Management, Inc. CRMC[®]
(208) 577-5202 - direct line*

----- Forwarded Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>
To: "Lizz" <lizz@frpmrentals.com>
Sent: 5/20/2012 6:04:02 PM
Subject: Good Morning! Questions???

Welcome to Monday morning!!!

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000457

Lizz, since the last statement came out, I have concerns and issues about the information provided. We had a conversation on the subject of finding out information after the fact last month, if I remember right,. Here again, I am finding out information and changes without knowledge of them and do not agree with some of them for SC. Little over 2 years ago when starting with FRPM, our conversations covered how SC, as a stand alone complex, would be operated at the direction of the POA board of directors.

FRPM is the association manager and take direction from the board of directors in regard to SC. The POA cannot be run the same as a 4 plex, there are budget constraints and board members who are elected to protect the member's interests in the POA.

Attached is a list of questions, 2 are for our property and 10 for the POA. The last statement brought this to a head, along with a few concerns that should have been handled differently from the board's position.

In managing the POA, we need to work as a team and get the best value for the members of the POA, like getting comparison insurance and lawn care quotes – as well as other services, in order to provide the best value for the POA members and live within the budget. I do a lot of this from 800 miles away, this becomes difficult at times, but when I find out after the fact that an insurance renewal was done without prior notice or a chance to get comparisons, - and believe FRPM did not get comparisons- this is a problem. In the past, the renewal was presented for approval, then paid, when did this change -the same for the pool and fence and advertising additions, etc.?

Lastly, the information from SC office is becoming less and less, the daily log is not very helpful anymore, then add in the attitude. The week Tara was sick brought out some short comings at the SC office. The use of the cell phone for personal use for over 6 months is unacceptable, - Tara stated you knew and approved this. Also, we traveled 1600 miles(800 each way) to correct the CO monitoring procedure that was being done incorrectly. Over the previous 6 months, how many water heater changes and unnecessary expense to owners was caused by water heaters being changed due to inaccurate readings, - will we ever know? Now there is a question about who pays for cut AC lines – you have all the information I have on that. The false accusation of not responding to issues or emails from SC, made by Tara at a meeting, is unacceptable. The attitude and communication being sent from SC office is bordering on unacceptable. There needs to be guidance and supervision at SC office, they cannot be left alone, just as you or I cannot. Communications are central to any relationship.

We all have others to answer to and when I get calls from owners who are upset or I find out after the fact an operation or procedure is being done differently than agreed upon, this becomes an issue. Information has to be verified and corrected if needed before it becomes a problem

We all need to work together as a team to accomplish the best value for the members of the POA, the board has been elected to do so, please involve them and give them the necessary information to act appropriately.

Look forward to your responses to the attached issues.

--

Virgina and Jon

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FR02871

000459

20



Commerce Centre <ccbusinesspark@gmail.com>

CO detectors

19 messages

sagecrest <sagecrest@frpmrentals.com>

Thu, Oct 11, 2012 at 8:55 AM

Reply-To: sagecrest <sagecrest@frpmrentals.com>

To: Commerce Centre <ccbusinesspark@gmail.com>

Cc: Lizz <Lizz@frpmrentals.com>, Tony <tony@frpmrentals.com>

Hi Jon,

After yesterdays events I would like to have Chris go into every unit and check and make sure the CO detectors that we installed are in working condition. The units that do not have CO detectors I would like him to install one. Talking with the fire department yesterday they said that the detectors that we gave the tenants when this first happened is not enough to cover our end. He said the tenants may not have even put the batteries in and installed them properly. He said if they didnt then it would not be the tenants fault it would be our responsibility to make sure they are installed and working properly. He recommended installing the CO detectors that we have been installing in every unit. I would really like to do this to take the heat off us. I talked to Chris, he would charge \$25 per building to make sure they are all good. If there is a unit that needs a CO detector it would be \$55 for the detector and \$25 for installing it. Please let me know your thoughts.

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com

Commerce Centre <ccbusinesspark@gmail.com>

Thu, Oct 11, 2012 at 1:40 PM

To: sagecrest <sagecrest@frpmrentals.com>

Cc: Lizz <Lizz@frpmrentals.com>, Tony <tony@frpmrentals.com>

We will discuss this further, I will talk to the board and see how the board wants to proceed.

Virginia and Jon

[Quoted text hidden]

Commerce Centre <ccbusinesspark@gmail.com>

Mon, Oct 15, 2012 at 9:04 AM

To: sagecrest <sagecrest@frpmrentals.com>

Bcc: Tony Drost <Tony@frpmrentals.com>

Tara, please elaborate on the following question --- According to your discussion with the fire marshal, "the detectors that we gave the tenants....."; when was the decision made and by whom to give tenants CO detectors and have tenants install them?

Virginia and Jon



September 16, 2011



Tara Gaertner
Sagecrest Apartments
1805 East Overland
Meridian, ID

RE: WATER HEATER SITE INVESTIGATION

Dear Tara,

On September 7, 2011, Rick Everton of Engineering Consultants Inc. performed a Field Investigation at the Sagecrest Apartments regarding an issue with malfunctioning water heaters. This survey was performed after being contacted by Jon who had been experiencing premature failure of water heaters throughout the facility. Jon also stated that a service contractor had noted that the burners in the water heaters have been burnt out which has been attributed to lint from the clothes dryer plugging a ceramic disk in the heating chamber; ultimately this ceramic disk was removed so that it would no longer plug. Listed below is the report of the findings and potential items to resolve this concern.



A concern expressed by Jon was if adequate combustion air has been provided to allow proper combustion for the water heaters, additionally there was a concern that the lint from the dryers would continue to cause issues with the water heaters.

The layout of the apartments have (3) different floor plans, floor plan A, B and C. In both floor plans A and B the water heater is in the same room as washer and dryer, see photo at left. While on site I looked at (1) of each of the (3) floor plans to get a look at a typical apartment layout. During the site investigation it was noted that combustion air is provided to each of the water heaters through 5"x19" grilles high and low. The current mechanical code requires (2) openings into the space. These openings are required to be a minimum of 1 square inch per 1,000 Btuh of burner capacity. The openings are also required to be (1) within 12" of the ceiling and (1) within 12" of the floor. The water heaters in these rooms are 40,000 Btuh, resulting a minimum of 40 square inches of opening. The 5"x19" grilles are estimated to be 50% free area or 47.5 square inches of free area. With this we can say that the current design meets the code minimum combustion air.

It should be noted however that in floor plan A only, it was observed that the wall behind the upper grille had not been entirely cutout and 4-5 approximately 2" holes have cut out thus limited the combustion air to the space, see photo on next page. This does not meet the intent of the code and would be considered a code violation.

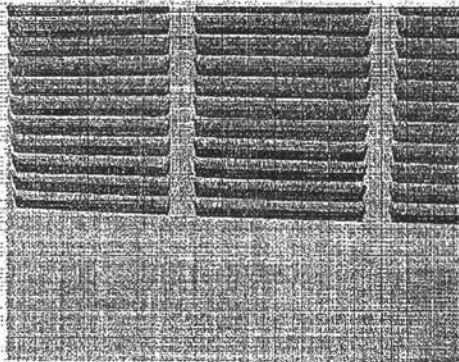
We investigated this issue with some water heater manufacturers and found that AO Smith used this ceramic disk technology in their water heaters. The disk was used to achieve proper air/fuel mixture to the combustion chamber. As air would go through the disk it did tend to plug and they did experience some burner failures. They claim that they have since redesigned the burners and resolved this issue. If these disks were removed from the water heaters as suggested by Jon, the water heaters would not receive a proper air/fuel mixture. Improper air/fuel mixture will result in a rich or lean firing condition often resulting in catastrophic failure of the burner.

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000463



Another issue contributing to this is that the combustion air is coming from inside the room and that air is potentially has lint particles. Even if the combustion air was brought in from outside it would still need to pass through the room to get to the water heater, thus entraining the lint particles. The only method to avoid this would be to furnish sealed combustion, high efficiency water heaters. These water heaters duct combustion air directly to the combustion chamber of the water heater. New flues and combustion air piping would need to be routed to each of these water heaters to retrofit them into the building. The cost of the new venting system and the initial cost of the water heaters make this a relatively expensive option.

In an effort to provide a best case fix of this issue without going to the expense of new sealed combustion water heater system we suggest the following.

- Fix combustion air intake in floor plan A to insure that proper combustion air is provided for. It should also be noted that we only looked at (1) of each floor plan and although plans B and C had proper combustion air intakes, all apartments should be field verified to insure all combustion air openings are unobstructed.
- Since the combustion chamber is near the bottom of the water heater and primarily where the air enters the water heater it is recommended that the water heaters be raised onto a platform. These platforms are used often in residential applications where the water heaters are placed in the garage. If the water heater is up off the floor we feel that this would minimize the amount of lint coming directly into combustion chamber that builds up on the floor.

Thank you for contacting us, if there is further need to contact us or if there are any questions please do not hesitate to contact us.

Sincerely,

A handwritten signature in dark ink, appearing to read "Rick Everton".

Engineering Consultants, Inc.
Rick Everton

22

From: VJK <aire1@pacbell.net>
Sent: Thursday, September 29, 2011 5:48 PM
To: Bill Raff
Cc: Tony Drost; Sagecrest
Subject: Re: Millennium Retail Center Zoning hearing.

Bill, thanks for the heads up, I believe the representation is covered and we will have a voice at the meeting.

Also, wanted to follow up on the water heater issue. The board went ahead and got an evaluation of the situation with the WH. The results were 2 suggestions: 1. ensure that adequate intake air is available, accomplished by enlarging the intake vent if necessary. The existing intake venting was adequate with the exception of 'A' models. 2. Raise the WH off the floor. This option is already being implemented with the new WH since the air intake is from the sides of the WH and not from underneath. If each WH had to be physically raised, this would involve relocation expenses like water lines, expansion tanks and heating coil connections.

Hope this information is helpful.

 Virginia and Jon 

--- On Mon, 9/26/11, Bill Raff <wmraffdesigns@yahoo.com> wrote:

From: Bill Raff <wmraffdesigns@yahoo.com>
Subject: Millennium Retail Center Zoning hearing.
To: "Jon Kalsbek" <aire1@pacbell.net>
Cc: "Tony Drost" <Tony@FRPMRENTALS.COM>
Date: Monday, September 26, 2011, 6:18 PM

Gentlemen,

Will there be any representation from Sagecrest owners at the Meridian City council meeting on October 18th regarding the Millennium Retail Center. There is an amendment to change the zoning directly behind the units that back Overland from High Density Residential to Commercial.

I'm not sure how this might impact the owners on the north side of the complex of which I am an owner.

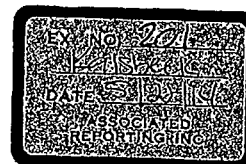
I would be concerned about retail units that might be open 24 hours a day in this complex or a gas station for example.

Thank you,

Bill Raff

The Green Craftsman, Inc

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FR05531

000466

Furniture Design and Fabrication
Santa Fe Springs, CA 90670
562 331 8355 Direct
562 868 2814 Fax

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FR05532

000467

ORIGINAL

Michael J. Elia (ISBN 5044)
Craig D. Stacey (ISBN 7996)
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Post Office Box 6756
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Telephone: (208) 336-6900
Facsimile: (208) 336-7031

NO. _____
A.M. _____ FILED PM. 442

SEP 09 2014

CHRISTOPHER D. RICH, Clerk
By KYLE MEREDITH
DEPUTY

Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, d/b/a SAGECREST MULTI
FAMILY PROPERTY OWNERS'
ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

**SUPPLEMENTAL AFFIDAVIT OF
COUNSEL CRAIG D. STACEY IN
SUPPORT OF DEFENDANT
SAGECREST MULTI FAMILY
PROPERTY OWNERS' ASSOCIATION,
INC.'S MOTION FOR SUMMARY
JUDGMENT**

STATE OF IDAHO)
) ss
County of Ada)

Craig D. Stacey, being first duly sworn upon oath deposes and states as follows:

1. I am one of the attorneys representing Defendant Sagecrest Multi-Family Property Owners' Association, Inc. in this litigation.

2. On July 24, 2014, I filed an affidavit as the affiant introducing into the record the Sagecrest Multi-Family Property Owners' Association, Inc.'s creating documents, the property

management agreements between the POA and First Rate Property Management and First Rate Property Management and the Matt Switzer Trust, and pages 74-77 of the deposition of Lizz Loop.

3. On August 22, 2014, the Plaintiffs and First Rate Property Management filed Oppositions with attached Affidavits to the POA's Motion for Summary Judgment.

4. The following documents and testimony is attached to this supplemental affidavit pursuant to Rule 56(e) permitting affidavits to be supplemented with further affidavits.

5. Attached hereto as Exhibit 6 is an email chain between Jon Kalsbeek and Tony Drost, bates stamped FR00444-445.

6. Attached hereto as Exhibit 7 is a true and correct copy of the deposition of Lizz Loop, pp. 10-13; pp. 46-49; pp. 146-149.

7. Attached hereto as Exhibit 8 is a true and correct copy of the deposition of Jon Kalsbeek, pp. 140-147.

8. Attached hereto as Exhibit 9 is an email chain between Jon Kalsbeek and Tara Gaertner, bates stamped FR02319.

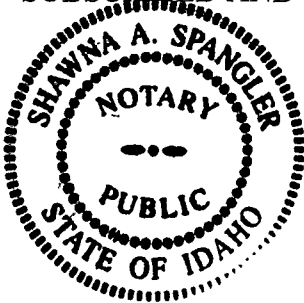
9. Attached hereto as Exhibit 10 is an email chain between Jon Kalsbeek and Tara Gaertner, bates stamped FR00195.

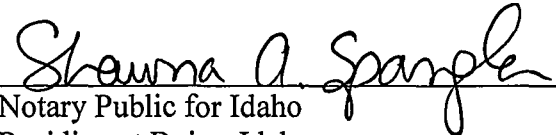
10. Attached hereto as Exhibit 11 is an email chain between Tara Gaertner and Matt Switzer, bates stamped FR00094, FR03001-2.

DATED this 9 day of September, 2014.


Craig D. Stacey

SUBSCRIBED AND SWORN TO BEFORE me on this 9th day of September, 2014.




Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 2-15-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of September, 2014, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

Eric R. Clark, Esq.
CLARK & ASSOCIATES, ATTORNEYS
PO Box 2504
Eagle, Idaho 83646
For Plaintiff

☐ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Facsimile Transmission 208-939-7136
☒ E-Mail: ec Clark@clark-attorneys.com

Tyson E. Logan
G. Bryan Ulmer
THE SPENCE LAW FIRM
PO Box 548
Jackson, WY 83001
For Plaintiff

☐ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Facsimile Transmission 307-733-5248
☒ E-Mail: logan@spencelawyers.com
ulmer@spencelawyers.com

James D. LaRue
Matthew Walters
ELAM & BURKE, PA
PO Box 1539
Boise, ID 83701
Elam & Burke, PA
For A. O Smith

☐ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Facsimile Transmission 208-384-5844
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Mark Tripp
BRADSHAW, FOWLER, PROCTOR & FAIR
GRAVE, P.C.
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For A. O Smith

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*For Mathew E. Switzer and the
Mathew E. Switzer Trust*

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Robert A. Anderson
Robert A. Mills
ANDERSON, JULIAN & HULL LLP
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Boise, Idaho 83707-7426
For First Rate Property Management & Drost

☐ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Facsimile Transmission 208-344-5510
☒ E-Mail: raanderson@ajhlaw.com
rmills@ajhlaw.com

William A. Fuhrman
Christopher P. Graham
JONES GLEDHILL FURHRMAN
GOURLEY, P.A.
PO Box 1097
Boise, Idaho 83701
For Anfinson Plumbing


☐ U.S. Mail, postage prepaid
☐ Hand Delivered
☐ Facsimile Transmission 208-331-1529
☒ E-Mail: bfuhrman@idalaw.com
cgraham@idalaw.com

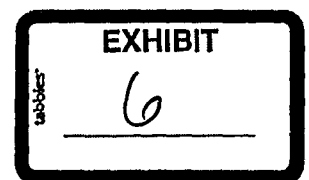
John M. Howell
BRASSEY CRAWFORD & HOWELL, PLLC
PO Box 1009
Boise, Idaho 83701-1009
*For Jon Kalsbeek, Jay Arla, Christopher
Schwab and David Meisner*

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For Daniel Bakken

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Craig D. Stacey



000473

From: VJK <aire1@pacbell.net>
Sent: Wednesday, August 03, 2011 9:58 PM
To: Bill Raff; Sheila Thomason; Tony Drost
Cc: Sagecrest; Lizz Loop; William and Beth Raff
Subject: RE: Water Heater Needs Replaced ASAP
Attachments: image009.jpg; image003.jpg; image004.jpg; image005.jpg; image006.png; image007.png; image008.png

Well, we were just trying to clarify since the POA is being asked to research this issue with mechanical engineers and such.

Jon,

What can the association do to get a professional (licensed mechanical engineer) in to solve this once and for all?

The fix is to replace the problem units with a new design water heater. We have asked Sheila to make sure that these new water heaters do not create the same issues and the information sent appears to indicate and express plumbing states that the new WH are better designed.

Sheila and us have discussed enlarging the air intake from the living room on C models and the exhaust is being enlarged with the new WH during install according to Sheila. The A and B models are another issue since they are located in the same room as the dryers. The solution at this point is to add a vent from the hall and build a partial wall to keep the lint from entering the WH area. This solution is waiting a reply from Sheila to see the feasibility of these solutions. Have not heard to date.

The long term fix is having approved WH in a location that is kept clean. In addition, Sheila and us discussed the need to install CO2 monitors in each unit. Still waiting to hear if this is going to be done.

Just trying to stay in the loop, since the letter went out without the POA seeing it first and was only made aware of the letter after receiving calls regarding a letter we had not seen. We do not know of any other options under discussion at this time.

Thanks.

 Virginia and Jon 

--- On Wed, 8/3/11, Tony Drost <Tony@FRPMRENTALS.COM> wrote:

From: Tony Drost <Tony@FRPMRENTALS.COM>
Subject: RE: Water Heater Needs Replaced ASAP
To: "VJK" <aire1@pacbell.net>, "Bill Raff" <wmraffdesigns@yahoo.com>, "Sheila Thomason" <Sheila@FRPMRENTALS.COM>
Cc: "Sagecrest" <sagecrest@FRPMRENTALS.COM>, "Lizz Loop" <Lizz@FRPMRENTALS.COM>, "William and Beth Raff" <raffbeth@yahoo.com>

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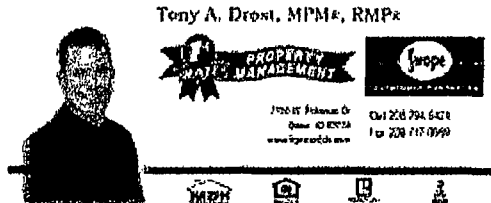


FR00444

000474

Date: Wednesday, August 3, 2011, 8:37 PM

Everyone understands that. As you have requested, FRPM is keeping the POA informed of any major issues happening within the complex. Also, their certainly will be savings for all if a common action/repair is made. IF we buy 100 water heaters at one time, we should be able to get them at a reduced price. If we do them one at a time, cost will be more. We're just trying to communicate the best we can.



Tony A. Drost

www.frpmrentals.com

www.boiseinvestmentproperties.net



From: VJK [mailto:aire1@pacbell.net]
Sent: Wednesday, August 03, 2011 9:34 PM
To: Bill Raff; Sheila Thomason; Tony Drost
Cc: Sagecrest; Lizz Loop; William and Beth Raff
Subject: RE: Water Heater Needs Replaced ASAP

Just to clarify, the water heaters are interior items of each unit and is therefore an owners choice on how to handle this situation, not the POA. This makes the costs for inspections and evaluations an owner may request, owner responsibility.

This was discussed in depth with FRPM and Sheila.

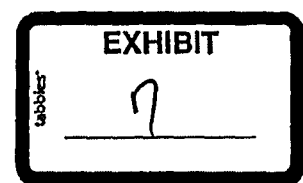


--- On Wed, 8/3/11, Tony Drost <Tony@FRPMRENTALS.COM> wrote:

From: Tony Drost <Tony@FRPMRENTALS.COM>
Subject: RE: Water Heater Needs Replaced ASAP

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FR00445
000475



000476

1 A. Some of them did, yes.
 2 Q. Okay. But you don't remember whether
 3 all of them did?
 4 A. I do not.
 5 Q. Okay. Let me ask you: Were there any
 6 documents that you looked at that you possessed
 7 related to this case?
 8 A. They were all e-mails that were
 9 provided.
 10 Q. Okay. Provided to the plaintiffs or
 11 provided --
 12 A. Provided to the attorneys.
 13 Q. -- to your counsel? Okay. Fair enough.
 14 Did you review any transcripts of
 15 depositions?
 16 A. I reviewed Tony's.
 17 Q. And how about Tara's?
 18 A. I did not.
 19 Q. How about Missy Rushing?
 20 A. I did not.
 21 Q. How about Sheila Thomason?
 22 A. I did not.
 23 Q. Jon Kalsbeek?
 24 A. I did not.
 25 Q. So Tony was the only deposition

[Page 10]

1 transcript that you reviewed?
 2 A. Yes.
 3 Q. Okay. Did you discuss -- have any
 4 discussions with Tony about his deposition?
 5 A. Yes.
 6 Q. And when were those? When did you have
 7 those discussions?
 8 A. After his depositions.
 9 Q. Okay. What did those discussions
 10 entail?
 11 A. I cannot tell you particulars.
 12 Q. Okay. After you read Mr. Drost's
 13 deposition, did you go back and ask him any
 14 particular questions related to his testimony?
 15 A. No, I did not.
 16 Q. Okay. Was there anything that you read
 17 in Mr. Drost's testimony, as you sit here today,
 18 that you thought contradicted what you knew or
 19 understood at the time?
 20 A. Yes.
 21 Q. Okay. Can you tell me what that was?
 22 A. It had to do with the agreement with the
 23 POA.
 24 Q. Can you be more specific?
 25 A. I believe he had stated that he had not

[Page 11]

1 seen the document.
 2 Q. The agreement with -- the written
 3 agreement with the POA?
 4 A. Correct.
 5 Q. And you believe that that was incorrect?
 6 A. Yes.
 7 Q. Okay. And how do you --
 8 Why do you believe that?
 9 A. He helped create the document.
 10 Q. Okay. Any other thing that comes to
 11 mind about his testimony?
 12 A. No.
 13 Q. Okay. And I talked with you about
 14 reading deposition transcripts.
 15 Did you speak with any current or former
 16 First Rate Property Management employees other than
 17 Mr. Drost about this case prior to your deposition?
 18 A. I've spoken to Tara.
 19 Q. Okay. When did you speak to Tara?
 20 MR. ANDERSON: Well, you need to distinguish
 21 if she's talking with Tara about the request of
 22 counsel versus just some non-attorney-related
 23 communication. Otherwise, I'm going to not let her
 24 answer.
 25 Q. (BY MR. CLARK) Well, did you talk to

[Page 12]

1 Ms. Gaertner after November 10th -- or
 2 November 10th, 2012, at the request of counsel?
 3 A. No.
 4 Q. I guess I'm -- I didn't understand
 5 your --
 6 MR. ANDERSON: I may have asked a question
 7 of Lizz to inquire of Tara, and then I get the
 8 answer back.
 9 MR. CLARK: Got you.
 10 MR. ANDERSON: And that communication would
 11 be privileged.
 12 MR. CLARK: Right.
 13 Q. (BY MR. CLARK) Other than that type of
 14 communication, did you have communication with Tara
 15 about the facts of this case?
 16 A. I discussed the case.
 17 Q. Let me go back to your comment about
 18 Mr. Drost's deposition.
 19 A. Yes.
 20 Q. With regard to creating the POA
 21 agreement, what particular parts or sections do you
 22 believe Mr. Drost was involved in creating?
 23 A. I don't know. He worked with Jon on
 24 creating the document.
 25 Q. Okay. Were you involved with creating

[Page 13]

1 unit owner would pay for it?
 2 A. Correct.
 3 Q. It sounds like these are all interior
 4 issues --
 5 A. Correct.
 6 Q. -- that you would be checking?
 7 A. Yes.
 8 Q. Okay. I'm going to go back to the start
 9 of your deposition on the first day.
 10 A. Okay.
 11 Q. When you started your deposition, you
 12 were asked if you disagree with anything that Tony
 13 had stated in his deposition because you had
 14 reviewed his deposition.
 15 Is that correct?
 16 A. Correct.
 17 Q. And you said that he did help create the
 18 POA agreements with First Rate?
 19 A. Yes.
 20 Q. Where did this document come from? Do
 21 you know?
 22 Did they create it out of scratch? Was
 23 it a NARPM document?
 24 A. It was a document he received from
 25 another property manager that specializes in HOAs.

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[Page 46]

1 Q. Do you know who that was?
 2 A. Her name is Vickie Gaskill.
 3 Q. Mickey?
 4 A. Vickie.
 5 Q. Gaskill?
 6 A. Yes.
 7 Q. And who is Vickie? What company does
 8 she work for?
 9 A. I can't remember the name of the
 10 company.
 11 Q. Is this regularly how he gets these
 12 agreements?
 13 A. Not always.
 14 Q. So why did he get this one from Vickie?
 15 MR. ANDERSON: Speculation.
 16 Q. (BY MR. STACEY) If you know.
 17 A. Because she manages a lot of HOAs and
 18 POAs.
 19 Q. And you guys don't have the experience
 20 with HOAs and POAs?
 21 Or I should say First Rate doesn't have
 22 as much experience, so they didn't have an
 23 agreement in place that they could use?
 24 A. Correct.
 25 Q. Okay. What did Tony do before he

222

[Page 47]

1 presented this agreement with the POA to this
 2 document? Do you know?
 3 A. I -- I don't know.
 4 Q. Did you look at the document with him?
 5 A. No.
 6 Q. Did you look at the document yourself
 7 before you sat down with Jon?
 8 A. Yes. And actually, I probably did sit
 9 down with Tony and go over the document.
 10 Q. Okay. So would you sit down with him
 11 and make changes, go over it, talk about the
 12 different provisions in the agreement?
 13 How would that go?
 14 A. Yes. I would go over it with him and
 15 ask for clarification on areas that I was not
 16 familiar with.
 17 Q. Okay. How involved was Tony with the
 18 overall day-to-day running of Sagecrest?
 19 MR. ANDERSON: Form.
 20 THE WITNESS: He was involved via e-mail or
 21 if Tara had questions regarding the overall
 22 management of the POA.
 23 Q. (BY MR. STACEY) Okay. Do you know what
 24 Tara's background experience was prior to going
 25 over to the Sagecrest complex?

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[Page 48]

1 A. She worked at First Rate.
 2 Q. What did she do for First Rate? Do you
 3 know?
 4 A. She had been in the reception area. She
 5 had done leasing. She had done showings of
 6 properties.
 7 Q. Had she had any training on managing a
 8 complex?
 9 A. No.
 10 Q. And I believe you stated that First Rate
 11 had never managed a POA like this before.
 12 A. Not this size, no.
 13 Q. What training do you have managing a
 14 POA?
 15 A. I don't have training managing a POA
 16 other than what I learned throughout Sagecrest.
 17 Q. And you're a member of NARPM.
 18 Is that correct?
 19 A. Yes.
 20 Q. Did you do any education classes?
 21 A. Yes.
 22 Q. Did any of these involve managing a POA?
 23 A. They might have, but at that time, we
 24 did not manage any POAs or HOAs.
 25 Q. Okay. Whose job was it to oversee Tara

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[Page 49]

1 married.
 2 Is that --
 3 A. Yes.
 4 Q. -- to that gentleman?
 5 Do you know his name?
 6 A. Kelly.
 7 Q. And I can't remember her new last name.
 8 A. Pecora.
 9 Q. P-e-c-o-r-a?
 10 A. Yes.
 11 Q. Okay. And it's my understanding that
 12 during this meeting, you discussed the event and
 13 kind of talked about what had happened.
 14 Is that fair?
 15 A. Yes.
 16 Q. You were asked some questions about the
 17 meeting in the first deposition day, and I just
 18 want to try to see if I can spark your memory or
 19 recollection on different things.
 20 I mean, I'm just going to start with a
 21 general question. You've already been asked some
 22 of this stuff, but what was discussed at that
 23 meeting?
 24 ~~A. The procedures.~~
 25 Q. Okay. And I'm going to get into details
 321

[Page 146]

1 here.
 2 Other than the topic of the procedures,
 3 what else?
 4 A. The consequences.
 5 Q. Okay. Anything else?
 6 A. Not that I remember.
 7 ~~Q. So what about the procedures was~~
 8 ~~discussed?~~
 9 ~~A. She informed Tony and I that she was not~~
 10 ~~testing all the units?~~
 11 Q. Prior to November 11, 2012, did you have
 12 knowledge as to what units were being tested?
 13 A. All --
 14 MR. ANDERSON: You mean what was her
 15 understanding of --
 16 MR. HOWELL: Yeah.
 17 THE WITNESS: My understanding was all units
 18 were being tested.
 19 ~~Q. (BY MR. HOWELL) Okay. And so the~~
 20 ~~November 11 time period -- or, sorry, meeting, Tara~~
 21 ~~indicates that she wasn't following that procedure?~~
 22 ~~A. Correct.~~
 23 Q. What specifically did she say, if you --
 24 I mean, do you recall specifically what
 25 her comments were?
 322

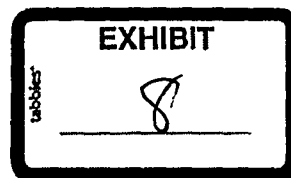
[Page 147]

1 A. Not word for word.
 2 Q. Okay. Did she tell you whether she
 3 tested Unit 4624 during the months leading up to
 4 the event?
 5 A. She did not.
 6 Q. She didn't tell you or she didn't test
 7 it?
 8 A. She did not tell me.
 9 Q. Was she able to articulate which units
 10 she did test prior to -- in the months --
 11 Did she tell you which units she did
 12 test between March 2012 and November 2012?
 13 A. No, she did not tell me.
 14 Q. Did you ask her that?
 15 A. I don't remember.
 16 Q. Okay. Did her fiancé at the time have
 17 any input during this meeting?
 18 A. No.
 19 Q. Did she say that she didn't do anything
 20 else? And let me clarify that.
 21 ~~She's indicated that she didn't test as~~
 22 ~~set forth in the procedures?~~
 23 ~~Was there anything else that she didn't~~
 24 ~~do that she admitted to you?~~
 25 ~~A. Not that I recall.~~
 323

[Page 148]

1 Q. Okay. The procedures talk about various
 2 other things. It's not just about testing.
 3 Is that right?
 4 And we can pull them out if we want to.
 5 I think it's Exhibit 53.
 6 Do you have that in front of you?
 7 A. I'm getting to it.
 8 ~~Q. Okay. So the question is: In looking~~
 9 ~~at Exhibit 53, it's a one-page document, did she~~
 10 ~~tell you and Tony that she didn't test as set forth~~
 11 ~~in the procedures?~~
 12 ~~A. She told us that she was not testing~~
 13 ~~every unit.~~
 14 Q. Okay. Did she tell you anything else
 15 about these procedures that she wasn't following?
 16 A. No.
 17 Q. Okay.
 18 MR. ANDERSON: I need to take a quick break.
 19 MR. HOWELL: Sure.
 20 (Discussion held off the record.)
 21 MR. HOWELL: Do you want to add anything?
 22 MR. ANDERSON: No.
 23 Q. (BY MR. HOWELL) How long did the
 24 meeting take?
 25 A. Maybe an hour.
 324

[Page 149]



000480

<p>1 Q. Did you not know that he had that 2 background? 3 A. I don't recall that background, but -- 4 Q. Okay. 5 A. -- I'm reading it, so I must have read 6 it then. 7 Q. Okay. On or about December 22nd, 2011, 8 did you communicate with anyone at First Rate about 9 the testing procedures that had been requested of 10 them? 11 A. No. Tara had stated she had been 12 trained by Intermountain Gas and further by 13 Express. 14 Q. And after Mr. Schwab had made a detailed 15 list of protocols for testing, did you ask her if 16 she was following those based on her training? 17 A. I don't believe so. I left it to 18 First Rate to handle it. 19 Q. To handle what? 20 A. How they did that. 21 Q. Do you think it would have been helpful 22 to make sure that, in your mind, that she was 23 following the suggestions that Mr. Schwab had come 24 up with? 25 A. Would it have been helpful? Yes. 597</p> <p style="text-align: right;">[Page 140]</p>	<p>1 Q. How did you do that? 2 A. Dropped it off at the First Rate on-site 3 office. 4 Q. Okay. Did it come with any kind of test 5 gas? 6 A. I don't know. 7 Q. Did you talk to the people at Grainger's 8 about proper calibration or operation or anything 9 like that? 10 A. No. As I stated, Tara had stated she 11 was trained by Express and it was the same model 12 that Express had -- 13 Q. Okay. 14 A. -- was using. 15 Q. Did you have any discussions with her 16 after dropping it off regarding the tester? 17 A. No. 18 Q. Have you ever had any discussions with 19 her about the tester itself and the operation, the 20 use of it? 21 A. Not that I recall. 22 MR. ANDERSON: Why don't we take a quick 23 break. 24 (Break taken from 2:17 p.m. to 2:33 p.m.) 25 Q. (BY MR. ANDERSON) Mr. Kalsbeek, you're 599</p> <p style="text-align: right;">[Page 142]</p>
<p>1 Q. Based on this exchange, did the board 2 authorize the purchase of a CO tester? 3 A. Yes. 4 Q. Who actually purchased it? 5 A. I believe I did. 6 Q. Okay. Does that mean you went to a 7 store and got it or did you go online or how did 8 you do it? 9 A. If I remember correctly, I got a check 10 from First Rate and went to Grainger's and picked 11 one up, but I could be wrong in that. 12 Q. Okay. 13 A. I don't remember exactly how it came 14 about, but I'm sure it came from Grainger's. 15 Q. And you remember having it in your 16 hands? 17 A. In the box, yes. 18 Q. In the box? 19 Did you look at the box, just out of 20 curiosity, to see if there were any instructions on 21 it? 22 A. I didn't open the box, but I had the 23 box. 24 Q. Okay. Did you give it to First Rate? 25 A. Yes. 598</p> <p style="text-align: right;">[Page 141]</p>	<p>1 back on the record, as are we. The next event I'd 2 like to talk to you about -- or time period is 3 March of 2012. 4 What was your first awareness that there 5 had been some testing done at Sagecrest in March of 6 2012? 7 A. A phone call from Tara. 8 Q. All right. And what was the substance 9 of that phone call? 10 A. A water heater in our building tested 11 high. 12 Q. Do you remember which building tested 13 high? 14 A. It was Building 37. 15 Q. It looks like from her notes, 3724 had a 16 reading of 274. 17 Does that sound like a PPM number that 18 you might have heard? 19 A. I thought it was different than that, 20 but yes. 21 Q. Did she tell you that she was calling 22 all unit owners, property owners, to tell them 23 about the results of the testing that had occurred 24 on March 9, 2012? 25 A. No, she didn't. 600</p> <p style="text-align: right;">[Page 143]</p>

1 Q. All right. What was your response?
 2 ~~A. I believe we were on our way up to here,~~
 3 ~~and I believe I said we would come up and check it~~
 4 ~~and discuss it with her.~~
 5 Q. Do you believe you were en route at the
 6 time of the call or was it imminent in terms of
 7 your departure?
 8 ~~A. We were planning a trip.~~
 9 Q. And when you say, "We were going to
 10 check it," what would you have checked?
 11 ~~A. To view what our unit was doing and--~~
 12 ~~and what had happened and what the situation was.~~
 13 ~~Just look at the situation.~~
 14 Q. Did she tell you that she was about to
 15 switch out your water heater?
 16 A. She said it tested high and needed to be
 17 switched out, yes.
 18 Q. Okay. Did she tell you that that was
 19 imminent?
 20 A. No.
 21 Q. So you didn't have to tell her not to do
 22 your unit until you got there?
 23 A. That's correct.
 24 Q. Did you ask her how she was testing at
 25 the time?

601

[Page 144]

1 A. Don't believe so.
 2 Q. When you got that call, do you recall
 3 that it was approximately the same day that she'd
 4 done the testing and she was relaying
 5 contemporaneous information to you?
 6 A. I had no idea.
 7 Q. Okay. At that point in time when you
 8 got that call, did you know anything, I mean
 9 anything, about how one tested for CO emanating
 10 from a water heater?
 11 A. The --
 12 Okay. How one tested?
 13 Q. Right. Did you have any knowledge
 14 before that call came in?
 15 A. No.
 16 Q. All right. You'd never done it before
 17 in your life?
 18 A. No.
 19 Q. You'd never read anything about it?
 20 A. No.
 21 Q. You'd never asked anybody about it?
 22 A. No.
 23 Q. Okay. You did know that Mr. Schwab had
 24 some protocols that he had suggested, but that's
 25 about it?

602

[Page 145]

1 A. That's about it.
 2 Q. Okay. Did you ask Tara on the day of
 3 the call what she planned to do with respect to the
 4 other owners?
 5 A. With respect to the other owners?
 6 Q. Yes.
 7 Did she tell you that she was going to
 8 send out some information to these owners regarding
 9 the affects of CO?
 10 A. No, not that I recall.
 11 Q. So have you told me everything you can
 12 recall about that conversation?
 13 A. There was additional discussion because
 14 the testing in July, if I remember the spreadsheet
 15 correctly, if the water heater tested over 300,
 16 they changed it right away. If it tested under
 17 300, they cleaned it.
 18 And so we asked if it could be cleaned.
 19 Q. Okay. What did she say?
 20 A. The only thing I remember was that she
 21 sent an e-mail saying that she didn't want to go
 22 round and round. And another owner had tested at
 23 50 and she had cleaned it, and now she has the
 24 pleasure to go back and tell them to replace it.
 25 Q. Okay. Do you remember back in the
 603

[Page 146]

1 July 2011 period that the conclusion was reached
 2 that it was difficult to clean the water heaters
 3 and that they simply needed to be replaced, that
 4 that was something that Express Plumbing had
 5 mentioned?
 6 A. I did not realize that, no.
 7 Q. Okay. I'm going to show you an exhibit.
 8 (Deposition Exhibit No. 209 was marked.)
 9 Q. (BY MR. ANDERSON) Exhibit 209 is an
 10 e-mail dated March 9th, 2012; two pages. The
 11 second page is a list of hazards of carbon
 12 monoxide.
 13 Have you ever seen either the e-mail or
 14 the attachment before?
 15 A. I don't remember the e-mail. I vaguely
 16 remember the attachment.
 17 Q. Okay. Could you turn to Exhibit 133,
 18 please.
 19 Exhibit 133 has a March 12th, 2012,
 20 e-mail at the top, but I'm interested in the middle
 21 and bottom e-mails.
 22 The bottom e-mail, I don't know what it
 23 is. It says, "From Sagecrest to Jon and Virginia,"
 24 and it has your e-mail address on it.
 25 A. Uh-huh.

604

[Page 147]



000483

From: 'sagecrest' <sagecrest@frpmrentals.com>
To: VJK<aire1@pacbell.net>
Sent: Monday, March 12, 2012 2:01 PM
Subject: Re: WH CO Levels

Express Plumbing checks the levels with their detector as well before replacing them and their reading was fine. I tested again and it came out ok. So for now it is good. I will keep an eye on it and let you know if there's any problems.

Tara Gaertner
Sagecrest Apartments
First Rate Property Management
P: (208) 514-4304
F: (208) 884-3487
www.sagecrestapts.com

On 3/9/2012 7:21 PM, VJK wrote:

Tara, Please do not send this info out to owners or tenants, it is not relevant to the levels of CO in the flue, the info sent refers to the exposure levels in a room over a period of time and what symptoms would occur. This info applies to symptoms of CO poisoning not the levels in the flue and are not the levels in the apartment unit.

A CO detector is activated at 70 ppm, this would be room CO level.

You are correct about the 100ppm as a guideline for WH flue, this does not necessarily require the WH to be replaced if above 100ppm. The level can be as high as 300ppm before mandatory replacement is suggested. The WH should be cleaned, the air intake area and screening. If this does not correct the levels to within acceptable levels, then further action maybe required. When this issue was first addressed, the attached spreadsheet was produced - the spreadsheet shows WH's under 300ppm should be cleaned - not replaced.

Please keep this issue in prospective for both owners and tenants, we do not want a health hazard nor do we want to do replacements and increased costs for owners when not necessary.

☺Virginia and Jon☺

--- On Fri, 3/9/12, sagecrest <sagecrest@frpmrentals.com> wrote:

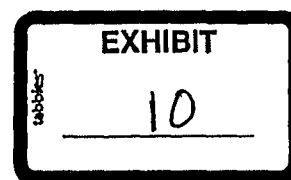
From: sagecrest <sagecrest@frpmrentals.com>
Subject:
To: "John and Virginia" <aire1@pacbell.net>
Date: Friday, March 9, 2012, 1:02 PM

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FR02319

000484



000485

From: sagecrest <sagecrest@frpmrentals.com>
Sent: Tuesday, May 29, 2012 11:49 AM
Subject: Re[2]: Filter changes and CO testing

~~Ok, I didnt because there were no problems to report but next time I'll just put they were all ok-->~~

Tara Gaertner
Sagecrest Apartments
(208) 514-4304
frpmrentals.com

----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>
To: "sagecrest" <sagecrest@frpmrentals.com>
Sent: 5/29/2012 11:46:05 AM
Subject: Re: Filter changes and CO testing

Thank you, Information like this would be helpful on the log so we know if procedures are effectively working. Please include additional details on items like this that have to do with the POA on the log.



On Tue, May 29, 2012 at 9:14 AM, sagecrest <sagecrest@frpmrentals.com> wrote:
Everything went very well. There were none that tested above zero.

Tara Gaertner
Sagecrest Apartments
(208) 514-4304
frpmrentals.com

----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>
To: "sagecrest" <sagecrest@frpmrentals.com>
Cc: "Lizz" <Lizz@frpmrentals.com>; "Tony Drost" <Tony@frpmrentals.com>
Sent: 5/28/2012 8:31:53 PM
Subject: Filter changes and CO testing

~~Tara, from the daily log, all filter changes have been completed. There is no mention of the CO testing and the results. Are there any questionable or above normal CO readings?~~

How many?

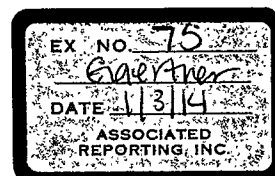
Which ones?

What were the readings?

--

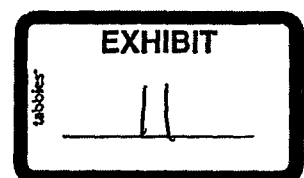
How did the new procedure work?





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000486 ER00195



000487

From: Sagecrest
Sent: Wednesday, November 09, 2011 3:47 PM
To: Matt Switzer
Subject: RE:

Hi Matt,

You are the first owner I have talked to. Freeze stats are \$55 a piece. Your building has had the PRV installed. There is only 1 PRV per building, so you're in the clear there. That is the major thing that I would definitely recommend. Freeze stats would probably be next. ~~All of your water heaters checked in good during the CO detecting.~~ We will be doing that again in November. I will let you know if there are any problems.

Thanks!
Tara

Tara Gaertner
Sagecrest Apartments
First Rate Property Management
P: (208) 514-4304
F: (208) 884-3487
www.sagecrestapts.com

Become a Fan!



From: Matt Switzer [mailto:matt.switzer@ymail.com]
Sent: Wednesday, November 09, 2011 3:22 PM
To: Sagecrest
Subject: Re:

11-9-11

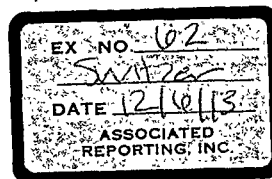
Hi Tara,

I agree with #1 and #2, but can't find the quote attached. What is the cost to install freeze-stats and a PRV at water main? I may already have had a PRV installed. I did not know we had a CO problem in the units. Would you let me know if my water heaters have a pressure release valve? The older models don't, but newer ones usually come with it. I'm not worried about a water heater with side vents due to cost.

I appreciate the heads up on these preventive maintenance measures. I'm trying to weigh costs vs benefits. Any help you can offer is appreciated. What is the general consensus among the other owners?

Sincerely,

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FR00094

000488

-Jared Heiner

--- On Wed, 11/9/11, Sagecrest <sagecrest@FRPMRENTALS.COM> wrote:

From: Sagecrest <sagecrest@FRPMRENTALS.COM>

Subject:

To: jaredheiner@yahoo.com, bcoopers6@yahoo.com, jay.aria@gmail.com,
eabecker1@tds.net, acamp094518@yahoo.com, bycappa@aol.com,
pursestrings@gmail.com, aire1@pacbell.net, matt.j.conner@gmail.com,
frank.deleo2@verizon.net, punitd1@gmail.com, mduffin@amalsugar.com,
jerryehlers@johnlscott.com, ronfacc@yahoo.com, hanoverholdings@gmail.com,
janel@parrfamily.com, cindyowen@q.com, amir.11@live.com, jpowell@digitallore.com,
wmraffdesigns@yahoo.com, Raffbeth@yahoo.com, krice@exwire.com,
paul.ryan@marcusmillichap.com, naisaechao0485@yahoo.com, cmschwab@aol.com,
Geneservatius@yahoo.com, calico2640@msn.com, grandmabj@aol.com,
matt.switzer@ymail.com, takatori1@frontier.com, carefreemgt@gmail.com,
lidetect60@hotmail.com, john.sonmez@gmail.com

Date: Wednesday, November 9, 2011, 12:44 PM

Attention Owners:

Several owners have asked what can be done to prevent the flooding problems associated with the heating/cooling systems at Sagecrest. Your association has been working diligently on a solution to help prevent the possible flooding of units from broken coils in the heating system and water heater failures. After much research and many discussions, preventative maintenance is recommended as the best solution to avoid potential problems.

1. Install freeze-stats on the A/C coils to prevent freezing of the water lines within the coils that provide heat during winter. Note: the coils freeze in the summer time from A/C unit icing. This install is done by an HVAC vendor and has been suggested several times in the past.

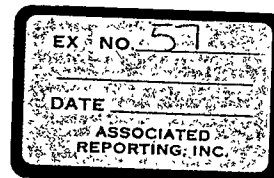
2. Install a PRV (Pressure Regulator Valve) on the main incoming water line to the building. Please view the attached quote for details of what is covered.

These are preventive maintenance items that owners are highly recommended to have done. The cost of losing a unit to flooding is greater than the installation of these items.

Below are the recommendations from the HVAC engineer to solving the CO problem in the units.

A. Increase the fresh air intakes for all floor plans

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by Adding louvers to the closet doors for ALL floor plans. \$187.50 per unit

B. Replace existing water heater with one that has side vents for ALL floor plans. \$650

C. Replace the smoke detectors with CO/Smoke detector combination sensor. \$62.48 per unit.

All of these recommended repairs are to help prevent the possibility of carbon monoxide entering the unit. These recommendations come from a report obtained by your association from a HVAC engineer evaluation.

Again, this work is highly recommended. Please let me know what you would like to have done and I can get that scheduled as soon as possible.

Tara Gaertner

Sagecrest Apartments

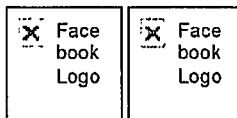
First Rate Property Management

P: (208) 514-4304

F: (208) 884-3487

<http://www.sagecrestapts.com/>

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Copy
Both
9-10-14
D)

ORIGINAL

NO. _____
A.M. _____ FILED P.M. 442

SEP 09 2014

CHRISTOPHER D. RICH, Clerk
By KYLE MEREDITH
DEPUTY

Michael J. Elia (ISBN 5044)
Craig D. Stacey (ISBN 7996)
MOORE & ELIA, LLP
Post Office Box 6756
Boise, Idaho 83707
Telephone: (208) 336-6900
Facsimile: (208) 336-7031

Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, d/b/a SAGECREST MULTI
FAMILY PROPERTY OWNERS"
ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

**DEFENDANT SAGECREST MULTI-
FAMILY PROPERTY OWNERS'
ASSOCIATION, INC.'S REPLY IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

COMES NOW Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,
by and through its counsel of record, Moore & Elia, LLP, and hereby submits this Reply in
support of its Motion for Summary Judgment.

COURSE OF PROCEEDINGS

Defendant Sagecrest Multi-Family Property Owners' Association, Inc. (hereafter "POA")
filed its Motion for Summary Judgment based upon issues of lack of a legal duty, as Plaintiffs

alleged in their 4th Amended Complaint.¹ Defendant First Rate Property Management, Inc (hereafter “First Rate”) filed an Opposition to the Motion, claiming that there is a material question of fact as to whether POA’s creating documents give it the authority to direct maintenance and health and safety activities throughout the entire Sagecrest Complex, including the interiors of all apartments at the Sagecrest Complex, as well as to direct the property management company regarding such duties and services. (*First Rate Opposition (hereafter “FR Opp.”)*, p. 16).

Plaintiffs also filed an Opposition to POA’s motion, claiming: (1) The POA owed a general duty to exercise reasonable care, (2) POA’s voluntary undertakings created a duty, (3) A material issue of fact remains regarding the POA’s control over the unit interiors, (4) The POA may still be liable to the Plaintiffs through their agent, FRPM, (5) The POA had control over FRPM’s performance with respect to unit interiors through the POA-FRPM Contract, (6) The Switzer-FRPM Contract does not limit the POA’s authority over unit interiors, (7) The POA’s actual exercise of control creates an issue of material fact regarding the scope of agency. (*Plaintiffs’ Opposition (hereafter “Ps’ Opp.”)*, pp. 14-22).

Both of the Opposition responses have set forth numerous facts and testimony that do not address the material issues in front of the Court for this Motion; namely, the legal duty the POA owed/did not owe to the Plaintiffs. Both Oppositions rely heavily upon the testimony of First Rate Property Management’s owner, Tony Drost and other First Rate employees in an attempt to create an issue of fact. However, Mr. Drost and his employees’ interpretation of the facts leading up to the November 10, 2012 incident cannot change the CCR’s or the agreements

¹ Additional documents have been added in this Reply in order to show a clearer picture of the events at issue than what has been presented without context in the Opposition. These documents have been added to the *Supplemental Affidavit of Counsel, Craig Stacey*, hereafter “*Supp. Aff. Stacey*”.

between the parties and they cannot change the fact that the POA does not have the power to control, maintain, or take any action with regard to the interiors of the units at Sagecrest.² Further, the voluntary undertakings of the POA do not create a duty to the Plaintiffs in #4624, if these undertakings created any duty, it was toward First Rate and/or the Owners of the Residential Lots.

ARGUMENT

1. The CCR's and Management Agreement between Matt Switzer & First Rate Property Management do not give the POA any authority over the interior of unit #4624.

First Rate has argued that the POA's creating documents give the POA the authority to direct maintenance and health and safety activities throughout the entire complex, including the interiors of all apartments at the complex. First Rate has cited to individual provisions of the Articles of Incorporation and the CCR's individually to make their argument that the POA has authority for the interiors of the units.

In construing a written instrument, it must be viewed as a whole and meaning given to all provisions of the writing to the extent possible. *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 748, 9 P.3d 1204, 1214 (2000). *See Magic Valley Radiology, P.A. v. Professional Business Services, Inc.* 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991); *Spencer-Steed v. Spencer*, 115 Idaho 338, 766 P.2d 1219 (1988); *Wing v. Martin*, 107 Idaho 267, 688 P.2d 1172 (1984); *Rutter v. McLaughlin*, 101 Idaho 292, 612 P.2d 135 (1980); *West v. Brenner*, 88 Idaho 44, 396 P.2d 115 (1964). In the absence of ambiguity, the document must be construed in its plain, ordinary and proper sense, according to the meaning derived from the plain wording of the

² In August of 2011, a discussion was had between Mr. Drost and Mr. Kalsbeek. (*Supp. Aff. Stacey, Exhibit 6, FR00445*). In this discussion, Mr. Kalsbeek reiterated that the water heaters are an interior item and, therefore, an owner's responsibility. (*Id.*). In Mr. Drost's own words, "Everyone understands that. As you have requested, FRPM is keeping the POA informed of any major issues happening within the complex." (*Id.*).

instrument. *C & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001).

a. The POA's creating documents do not give the POA any authority or duties regarding the interior of unit #4624.

The CCR's instruct that title to the Common Areas is owned in fee simple by the POA. (*Affidavit of Craig Stacey (hereafter "Stacey Aff."), Exhibit 2, Article 8.2*). The CCRs define the "Common Areas" as all real property, fixtures, personal property and improvements owned, leased or otherwise held by the Association exclusively for the common use and enjoyment of the Owners. (*Id., Article II*). The "Common Areas" include the driveway, parking lot, recreation center, and drainage lot. (*Id.*). Consistently, the POA has a duty to maintain these areas. (*Id., Article 3.3*). The POA also has a duty to maintain the exterior of each Four-Plex, which includes: the siding, structural portions, street lamps, and all other exterior surface areas. (*Id.*)

The Owners hold fee simple title to the Residential Lot where the Four-Plexes are located. (*Id., Article II*). It is not in dispute that Matt Switzer Trust (hereafter "Mr. Switzer") owns the Residential Lot wherein unit #4624 is located. (*See also, Exhibit 4, 2.4*) (OWNER warrants that OWNER is the sole owner of the PREMISES...). This is recognized and acknowledged in the CCRs, stating that the Owners have the exclusive right to the interiors of their units. (*Id., Article 3.5*).³ Consistent with this ownership, the owners have the duty to maintain the entire interior of their unit including the appliances, plumbing and plumbing fixtures, electrical system and fixtures, and all components of the heating and air conditioning system. (*Id., Article 3.3*).

Recognizing that the Owners have sole authority over their own Residential Lot, the CCRs ensure that the POA can get onto the Owners' property in order to fulfill its duties to

³ It is not surprising that neither Opposition to this Motion mentioned or attempted to explain this provision of the CCRs.

maintain the exterior of the Four-Plexes by granting an easement onto the Residential Lots for such purposes. (*Id.*, Article 3.6). Consistently, the Owners are also given an easement for use and enjoyment onto the common areas. (*Id.*, Article 8.4).

The only situation where the POA has the ability to step in and require an owner to perform maintenance on the interiors of the units is when “the Owner...shall fail to maintain any portion of such Owner’s Residential Lot that ***Owner is responsible to maintain***, in a manner reasonable(sic) satisfactory to the Board.” (*Id.*, Article 3.8) (Emphasis original). In order for the Board to take such action, however, they must vote on any action they contemplate taking, and then give the Owner notice and a hearing before the Board. (*Id.*)⁴

When the CCRs are viewed as a whole and the plain meaning is given to all provisions of the document, the CCRs delineate the power, authority, and duties on the complex to the entity that owns the respective property. The Owners have the authority and power as to the interior of their units for which they have fee simple title, and the POA has the power and authority to do as they see fit in the common areas for which they have fee simple title as long as it does not infringe upon the Owners rights to the use and enjoyment of such areas.

There is no genuine issue of material fact and the Court should rule as a matter of law that the POA does not have any authority or power in regard to the interiors of the units on the Residential Lots in the CCRs and, as such, the POA does not have any authority to control, maintain, or inspect unit #4624, the water heater or CO detector in that unit, or to test or confirm that CO detectors were installed in unit #4624, or to warn the tenants and their guest of any issues on the interior of #4624.

⁴ Article 3.8 had not been utilized by the Board in any unit, including #4624, and is not at issue in this claim.

b. The Agreement between Mr. Switzer and First Rate does not grant any authority or control to the POA.

Plaintiffs have also argued that the Agreement between Mr. Switzer and First Rate does not limit the POA's authority over the unit interiors.

Mr. Switzer owns #4624 and has the ability to appoint a sole and exclusive agent to manage his property, which he did. (*Stacey Aff., Exhibit 4, 2.1*). First Rate, as Mr. Switzer's agent, had sole authority to contract for services on his behalf and to contract for all ordinary repairs and replacements reasonably necessary to preserve and maintain his premises. (*Id.*, 2.5, 9.1, 9.4). First Rate also had power of attorney to manage repairs, alterations, and improvements, and to pay for such services on Mr. Switzer's behalf. (*Id.*, 19.2). In return for these and other services, Mr. Switzer paid First Rate 5% of the total monthly gross receipts from the Premises. (*Id.*, 16.1).

Mr. Switzer did not give the POA authority to control any issues on the interior of #4624 and there is no genuine issue of material fact that Mr. Switzer gave First Rate the authority to give any control over the interior of his units to another party, including the POA

2. The Management Agreement between the Sagecrest Property Owners' Association and First Rate Property Management is not ambiguous.

a. The term "Property" is not ambiguous.

Plaintiffs argue that undefined term "Property" within the Agreement between the POA and First Rate is ambiguous. (*Ps' Opp.*, pp. 19-20). Plaintiffs argue that this allegedly ambiguous term refers to the entire property at the Sagecrest complex resulting in the POA controlling the entire complex, including the interiors, through their agent First Rate. (*Id.*, p. 19). Plaintiffs also argue that "if the word 'Property' meant 'unit exteriors and common areas,' then this would produce an irrational reference to 'tenants and occupants of unit exteriors and

common areas.’” Plaintiffs claim, “the unit exteriors and common areas have neither tenants nor occupants and, therefore, the word ‘Property’ must embrace unit interiors as well.” (*Id.*)

The initial inquiry into whether a legal instrument is ambiguous presents a legal question, over which the court exercises free review. *Dr. James Cool, D.D.S. v. Mountainview Landowners Co-op. Ass’n, Inc.*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2004). In deciding whether a document is ambiguous, the Court seeks to determine whether it is reasonably subject to conflicting interpretation. *C & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001). To construe the deeds any other way would result in an inconsistent reading of the documents as a whole. *Id.*; *See also Swanson v. Beco Const. Co.*, 145 Idaho 59, 62, 175 P.3d 748, 751 (2007) (To determine whether a contract is patently ambiguous, a court looks at the face of the document and gives the words or phrases used their established definitions in common use or settled legal meanings.)

Initially, the POA can only contract regarding the property for which it controls; it cannot contract with First Rate regarding the interiors of the units located on the Residential Lots. An association has control over the common areas of a complex. *See 31 C.J.S. Estates § 278 (Updated June 2014)* (A condominium association may be held to a landlord’s standard of care as to the common areas under its control; however, a condominium association is not an insurer, and it is required to exercise only ordinary care. A condominium association has a duty to exercise due care for the safety of persons using those areas.)

Consequently, the term “Property” is defined in the Agreement as “the property commonly known as Sagecrest POA.” (*Stacey Aff., Exhibit 3, 2.1*). First Rate’s owner, Tony Drost, created this Agreement with POA’s president, Jon Kalsbeek. (*Supp. Aff. Stacey, Exhibit #7, p. 12, ll. 2-9, p. 13, ll. 17-24*).

Contrary to the Plaintiffs' argument, if the term actually meant to encompass the entire complex including the interiors, it would be nonsensical based on the fact that the POA does not have any authority over the interiors. The term is not ambiguous as between the parties, and an objection by a non-party to the Agreement does not create ambiguity.

It is unnecessary, but if the Court views this Agreement and the Agreement between Switzer and First Rate together, the term "Property" in each Agreement encompasses different property on the complex. The POA contract is in regard to the common areas, whereas the Switzer Agreement is in regard to the Residential Lot 1805 E. Overland, Bldg. 46 #11, #12, #23, and #24.

Further, Plaintiffs' argument in reference to Article 3.4 that "Property" must include the interiors in the First Rate - POA Agreement, otherwise it would produce an irrational reference to "tenants and occupants of unit exteriors and common areas" is perplexing at best. It is common sense that tenants and their guests will use the common areas, which include a grassy area, a playground, a swimming pool, and a clubhouse. In fact, the common areas were actually created "exclusively for the use and enjoyment of the Owners," and the Owners were given an easement for use and enjoyment onto the common areas. (*Stacey Aff., Exhibit 2, Article II, Article 8.4*). It should go without saying that this expected use would extend to the tenants and their guest. Therefore, it makes perfect sense that a property management company would have the ability to take reasonable and appropriate action for an event which may cause injury to tenants and occupants on the common areas. (*Stacey Aff., Exhibit 3, 3.4*).

The Management Agreement between the Sagecrest Property Owners' Association and First Rate Property Management is not ambiguous and the Court should not allow this issue to go to a jury to determine its meaning.

b. The POA could not contract with First Rate regarding the interiors of the units and, therefore, did not owe a duty to Plaintiffs through First Rate.

Plaintiffs argue that First Rate was acting as the POA's agent in regard to the interiors of the units and if they were negligent, the POA would be vicariously liable. (*Ps' Opp.*, p. 18). Plaintiffs also state, "the fact that FRPM acted as an agent for owners at Sagecrest with respect to unit interiors does not preclude it from also acting as the POA's agent with respect to the same subject matter. (*Id.*, p.20).

First Rate, in the Statement of Facts of its Opposition, bizarrely sets forth the following, possibly inferring that its own employees might actually be POA employees:

29. Section 6.2.6 of the *POA Agreement* states, "the following expenses are to be borne by ASSOCIATION and are not included in AGENT's management fees:...Resident Manager and/or Onsite Manager insurance, payroll taxes, employee benefits, and base salaries as dictated by the ASSOCIATION. Presently the ASSOCIATION employs two onsite personnel."

30. Tara Gaertner was assigned to the SPOA's "business and affairs," her salary was dictated and paid for by the SPOA, and Ms. Gaertner took instruction from the SPOA and its Board.

(*FR Opp.*, p. 7). However, there has been no argument that Ms. Gaertner was anything other than a First Rate employee while working at the Sagecrest complex.

Having no authority or duty to maintain any part of the interior of residential unit #4624, the POA could not direct First Rate to take any action in regard to the interiors of the units. Mr. Switzer was the only person that could direct First Rate to take action to repair or maintain the interior of unit #4624.

The Agreement between the POA and First Rate is in regard to "the property commonly known as Sagecrest POA", which as discussed is the common areas of the complex. First Rate's Agreement with the Owner of unit #4624, Matthew Switzer, is in regard to the "Premises" located at 1805 Overland Rd., Bldg 46, units #11, #12, #23, & #24." There is no

genuine issue of material fact that First Rate was acting as the POA's agent in regard to the interiors of the units.

3. The POA does not have authority over "global issues" involving the interiors of the units.

Plaintiffs have alleged that the POA exercised control over global issues including the maintenance and testing of the water heaters in the units. (*Ps' Opp.*, pp. 5-11). Plaintiffs set forth several past examples of global issues at the complex and jump to the conclusion that since the POA was involved in those issues, they had taken control of all of the global issues at the complex.⁵

The POA's creating documents, as well as Mr. Switzer's ownership of #4624 in fee simple, clearly prove that the POA could not, as a matter of law, control a global issue if it involved the interiors of the units. There is no authority or control given to the POA regarding global issues in the CCRs. Nor have the Plaintiffs set forth any document which creates a material issue of fact that Mr. Switzer gave authority to the POA for any global issue involving the interior of #4624.

To support the claim that the POA controlled global issues, the Plaintiffs rely heavily on the testimony of First Rate employees and the owner, Tony Drost. However, such testimony cannot create a material issue of fact with regard to the POA's legal duties toward the tenants and their guests. Similarly, the Plaintiffs point to an email chain involving the POA president, Jon Kalsbeek, and another POA member, Bill Raff, to claim that the POA controlled global issues. (*Declaration of Eric Clark (hereafter "Clark Dec."), Exhibit 10*). This chain begins with Mr. Raff acknowledging that the water heater in the units are the owners' responsibility and suggesting that the POA pool their resources as a group and try to find a solution to the issues

involving the water heaters so that each individual owner did not have to attempt to find a solution on their own. (*Id.*, FR1756). Mr. Kalsbeek agreed, responding that it would be beneficial to all owners to pool resources. (*Id.*, FR1755). Mr. Kalsbeek discussed that several issues at Sagecrest had been resolved in such a manner including: PRV's (pressure relief valves for water heaters), expansion tanks, filters, sewers, pool, and landscape. Some of these issues were common area issues, while some involved interior items. Mr. Kalsbeek indicated that the Board had been advised of the issues and was reviewing options. (*Id.*) He further indicated that the POA was researching several ideas with First Rate and that Sheila (First Rate employee) was keeping people informed and enacting the solutions. (*Id.*)

The POA's involvement in global issues have been, and are necessarily limited to, what actions they could actually take. The POA Board would research an issue depending on the issue at hand and would then suggest these ideas to the POA members (the Owners) or First Rate. It was then up to the Owners to accept the suggestion or not. This was reiterated in the meeting with Mr. Kalsbeek and First Rate employees on October 25, 2012. (*Clark Dec.*, Exhibit 9).

In that meeting they were discussing how many ceiling fans had been installed in the units during turnovers. Mr. Kalsbeek stated that there was a suggestion for a ceiling fan to be installed at the time a turnover was to take place, just like the installation of PRV valves and the other suggestions. (*Clark Dec.*, Exhibit 9, p. 99, l. 25 – p. 100, l. 1). First Rate employee, Liz Loop, reiterated that such items were “an owner decision and expense.” (*Id.*, p. 100, ll. 17-18).

Plaintiffs argue that “The POA's real world actions – taking it upon itself to pool resources and review options for replacing water heaters, and actively investigating the causes of

⁵ The claim that the POA took over global issues in the past and, therefore, they have control over the global issues in the present is also discussed in Defendant POA's argument in Section 3 of this Reply brief.

the problems – belie the POA’s current stance that it had no authority or control over such issues.” (*Ps’ Opp.*, p. 7). Throughout their Opposition, Plaintiffs leap to the conclusion that since the POA took any action at all; it proves that they had some control over the issues surrounding the water heaters. This conclusion is simply wrong. The POA is comprised of the owners at the complex. As such, the owners are very interested in finding solutions to any problem that affects their properties. However, a POA investigating an issue does not equate to the POA taking control of the situation because it does not have the authority to do so in its creating documents. Being involved in global issues in such a manner does not create a genuine issue of material fact that the POA had any control over the water heaters, their maintenance and/or repair, nor did it create a duty to the Plaintiffs

4. The POA did not assume a duty to the Plaintiffs or for any maintenance or repairs on the interior of #4624.

Plaintiffs claim that even if no duty arises under premises liability principles, a duty may nonetheless arise as a result of a voluntary undertaking. (*Ps’ Opp.*, p. 16-17). Plaintiffs list numerous examples of actions the POA took in regard to the water heater issues at the complex to demonstrate it assumed a duty including:

- a. Hiring a professional engineering firm to assess and provide suggestions for how to deal with the failing water heaters;
- b. Undertaking a program to test for CO;
- c. Undertaking to control the response including replacement and repair/maintenance of water heaters;
- d. Undertaking a program for installation of (some) carbon monoxide detectors;
- e. Warning tenants and owners of the threat of CO at the property.

(*Id.*, p. 17).

The POA did hire a professional engineering firm to assess and provide suggestions for

how to deal with the failing water heaters. However, there is no evidence to support the rest of these conclusions. Any undertakings by the POA were necessarily limited to the action taken and there is no evidence to create a genuine issue of material fact that such undertakings amounted to the conclusions alleged and/or assumed a duty to control the health and safe of the tenants.

The Idaho Supreme Court has recognized that “it is possible to create a duty where one previously did not exist. If one voluntarily undertakes to perform an act, having no prior duty to do so, the duty arises to perform the act in a non-negligent manner.” *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 987 P.2d 300, 312 (1999).

When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed. *Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 316 P.3d 92, 100 (2013). Merely because a party acts once does not mean that party is forever duty-bound to act in a similar fashion. *Id.* Thus, although a party may assume a duty by undertaking to act, that duty is limited to the scope of the undertaking.

Liability for an assumed duty can only come into being to the extent that there is in fact an undertaking. *Id.* A duty arises in the negligence context when one previously has undertaken to perform a primarily safety-related service; others are relying on the continued performance of the service; and it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking. *Id.*

- a. **The duties created through the POA’s voluntary undertakings are limited to those actions actually undertaken.**

The Plaintiffs have failed to create a genuine issue of material fact that the POA assumed a duty to protect them in unit #4624. Specifically, the POA did not create a duty to the Plaintiffs

to maintain unit #4624 in a safe and sanitary condition fit for human habitation, to provide and/or maintain unit #4624's water heater, to inspect unit #4624 after determining the water heater was leaking carbon monoxide, to test or confirm the carbon monoxide detectors were installed properly and working after delivering carbon monoxide detectors to unit #4624, or to warn tenants or their guests of any condition in unit #4624.

The question of whether the POA assumed a duty to act must be viewed in the context of what affirmative action it did take. *See Beers, supra*; *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 352, 179 P.3d 309, 315 (2008); *Udy v. Custer Cnty.*, 136 Idaho 386, 34 P.3d 1069 (2001). In *Udy v. Custer Cnty.*, an injured driver and his passengers brought action against the county and its sheriff, alleging that the sheriff observed and negligently failed to remove from the highway the rock the plaintiff later struck with his vehicle. Plaintiff argued that since the sheriff's practice was to remove or contact someone to remove obstructions from the highway, he assumed a duty to remove the rocks.

The Court disagreed holding that although a person can assume a duty to act on a particular occasion, the duty is limited to the discrete episode in which the aid is rendered. 136 Idaho at 389-90, 34 P.3d at 1072-73. In other words, past voluntary acts do not entitle the benefited party to expect assistance on future occasions, at least in the absence of an express promise that future assistance will be forthcoming. *Id. See also Beers*, 155 Idaho at 688, 316 P.3d at 100 (Merely because a party acts once does not mean that party is forever duty-bound to act in a similar fashion. A beach-goer may assume a duty to rescue a drowning swimmer in a non-negligent manner by undertaking to do so, but that same beach-goer has no obligation to rescue anyone else.)

i. By hiring an engineering firm to investigate part of the CO problem, the POA did not assume any other duties.

Plaintiffs argue that “the POA took upon itself to select and hire an engineering firm to investigate part of the CO problem, paying Engineering Consultants Incorporated (ECI) for an analysis of the failing water heaters at Sagecrest; unfortunately, the POA failed to act reasonably to follow through with the ECI recommendations.” (*Ps’ Opp.*, p. 7).⁶ As stated in *Beers and Udy*, this act does not create a duty to do anything other than to not be negligent in the hiring of an engineering firm to assess the water heater situation. The POA acted on behalf of the Owners and owed the Owners a duty of care for this action. There is no genuine issue of material fact that a duty of care is created towards the Plaintiffs by the fact that the POA hired ECI.

ii. The POA did not undertake a program to test for carbon monoxide on the interiors of the units.

Plaintiffs also claim that the POA took upon itself to undertake a program to test for CO. There is no support in the record for this assertion. The action that the POA took in this regard was to help create testing procedures for carbon monoxide in the units because First Rate did not have any written procedures at the time. Plaintiffs state that in March of 2012, Mr. Kalsbeek instituted a new set of CO testing procedures at the Sagecrest Apartments. (*Ps’ Opp.*, p. 8).

The CO procedures were created after Tara Gaertner sent Mr. Kalsbeek an email informing him that his unit #3724 had tested high for CO. (*Supp. Aff. Stacey, Exhibit 8, p. 143, ll. 4-16*). She then sent him an email the next day indicating that Express Plumbing had come and tested his unit and they did not get a high CO reading. (*Id.*, *Exhibit 9*). Mr. Kalsbeek had

⁶ The Plaintiffs have attacked and vilified Mr. Kalsbeek for these procedures stating that Mr. Kalsbeek created the procedures in order to save the owners money by purposefully getting inaccurate results. (*Ps’ Opp.*, p. 9-10). Defendants could not disagree strong enough to this allegation. However, these accusations are not material to the issues at hand because they do not create any material issues of fact that this action was limited to the creation of the documents; the POA did not undertake a program to test for carbon monoxide by this act.

already planned a trip to Boise and decided to go to the complex to see what the issue in his unit was. (*Id.*, *Exhibit 8*, p. 144, ll. 2-13). When he arrived, he found out that First Rate did not have any written procedures and so he met with the First Rate employees and they drafted some testing procedures. Mr. Kalsbeek did not involve himself in the testing of the units any further than following up with an email to Ms. Gaertner two months later to see if the procedures were working. (*Id.*, *Exhibit 10*). The POA, or Mr. Kalsbeek, never hired or retained anyone to take any action in the interiors of the units in regard to the carbon monoxide procedures on behalf of the POA.

Mr. Kalsbeek helped First Rate create testing procedures, he did not “undertake a program to test for CO” as alleged by the Plaintiffs. First Rate undertook the program to test for CO in unit #4624 because they had the authority to do so from Mr. Switzer. The POA, on the other hand, had no authority. In fact, Ms. Gaertner stated that she did not follow the testing procedures. (*Supp. Aff. Stacey*, *Exhibit 7*, p. 147, ll. 7-22; p. 148, ll. 21-25; p. 149, ll. 8-13).

iii. The POA could not control any response regarding the interiors of the units.

Plaintiffs allege that the POA undertook to control the response including replacement and repair/maintenance of water heaters and undertook a program for installation of (some) carbon monoxide detectors. Although the first part of this allegation is vague, Defendants interpret they are alleging that the POA undertook to control the response when there was a high CO reading in the units at Sagecrest. As set forth above, as a matter of law the POA could not control any of First Rate’s actions in regard to the interiors. In fact, First Rate contacted the Owners and the Owners responded to First Rate in regard to these issues. (*Id.*, *Exhibit 11*).

The second half of Plaintiffs’ allegation, that the POA undertook a program for installation of (some) carbon monoxide detectors fails for the same reason; the POA could not,

and did not, undertake any program for any issue on the interior of the units including #4624. The CO procedures mentioned above included a section on installing CO detectors on a systematic basis throughout the 2012 year at the complex. The POA did not take any further action in this regard other than to ask First Rate employee, Tara Gaertner, how the testing procedures were working. (*Id.*, *Exhibit 10*).

Plaintiffs' argue proof that the POA was in charge is found in a conversation between Mr. Kalsbeek and First Rate employees during a meeting in September of 2012. At this meeting they are discussing the CO procedures and the installation of CO detectors after an incident where Intermountain Gas came to the facility and tested a unit for carbon monoxide. (*Clark Dec.*, *Exhibit 9*, p. 1-10). Tara Gaertner indicated that she believed it should be mandatory to install these detectors in every unit. (*Id.*, p. 10, ll. 21-22). Ms. Gaertner further stated that she "understand[s] that it's the owners' decision 'cause(sic) it's the owners' money we're spending. (*Id.*, p. 11, ll. 2-5). Ms. Gaertner stated that some of the detectors had not been installed in units because the owners of those units hadn't given permission to do so. (*Id.*, p. 11, ll. 9-22). Mr. Kalsbeek stated, "There is absolutely nothing about owners' approval" in the [carbon monoxide] procedures. (*Id.*, p. 14, l. 15-16).

This issue, like every other issue regarding the interiors of the units is controlled by the Agreement between First Rate and the Owner. Mr. Kalsbeek was reiterating that First Rate had authority for such actions through the Agreement with the Owners. In Mr. Switzer's Agreement with First Rate, he authorized First Rate to "make or cause to be made...all ordinary repairs and replacements reasonably necessary to preserve and maintain the PREMISES in...a good state of repair" and First Rate did not need to obtain permission from Mr. Switzer as long as the expense was less than \$250.00. (*Stacey Aff.*, *Exhibit 4*, 9.1; 9.5). The POA did not hire anyone to install

CO detectors in the units.

In further support of this allegation, Plaintiffs claim that the POA installed hard-wired CO detectors in every unit that did not previously have one (over 100 units) in the course of a single day indicating that in the deposition of Jon Kalsbeek there was evidence of such a statement. (*Ps' Opp.*, p. 11). However, this is not at all accurate. The POA was not involved with the installation of these carbon monoxide detectors. In his deposition, Plaintiffs rely on Mr. Kalsbeek's statement where he indicated that he knew the installation of the carbon monoxide detectors had been done in all of the units. (*Clark Dec., Exhibit 2, p. 278, ll. 1-18*). He did not state that the POA installed them, authorized their installation, or caused them to be installed in any manner.

Plaintiffs also alleged that the POA undertook to control the response and warning tenants and owners of the threat of CO at the property. This, similar to each allegation and conclusion set forth above, is simply incorrect and by asking questions, or taking the limited actions above, the POA did not create a duty to the Plaintiffs to control any information between First Rate and the owners/tenants. The POA had no authority to control the information passed from First Rate to the owners and/or the tenants in regard to the interiors of the units and did not attempt to assert control over it.

The only communication Mr. Kalsbeek advised Ms. Gaertner not to send to the Owners or tenants was when she sent inaccurate information to him as an Owner regarding a water heater that tested high for carbon monoxide in his unit #3724. (*Clark Dec., Exhibit 17, FR00738*). She sent him a document that contained information instructing that it was in regard to CO levels in the flue, when it was actually referencing CO exposure levels in a room. Mr. Kalsbeek asked her "Please do not send this info out to owners or tenants..." (*Id.*) Ms. Gaertner flat out denied Mr.

Kalsbeek's request in her response to him. (*Exhibit 17, FR00737*). She instructed Mr. Kalsbeek that she sent out the information to the owners and tenants and would send any information to the owners in the future that she felt affected(sic) the tenants' health. (*Id.*). This does not create an issue over whether the POA attempted to assume control over any information given to the owners/tenants from First Rate.

None of the allegations above set forth by the Plaintiffs raise a genuine issue of material fact that the POA's voluntary undertakings caused them to assume any other duties toward the Plaintiffs.

5. The POA's voluntary undertakings did not create a duty to the Plaintiffs.

As stated above, the question on whether the POA assumed a duty to act must be viewed in the context of what affirmative action it took. *See Beers, supra; Baccus, supra; Udy, supra.* The question also arises as to whom this assumed duty is assumed on behalf of. As stated in *Beers*, a duty arises in the negligence context when one previously has undertaken to perform a primarily safety-related service and others are relying on the continued performance of the service. 155 Idaho 680, 688, 316 P.3d 92, 100.

Baccus v. Ameripride is instructive on the issues of whom the duty arises towards when one undertakes an action. In *Baccus*, the defendant had contracted to place non-slip safety mats at the entrance of a building. The defendant failed to place the safety mats on one occasion and Baccus slipped, fell and was injured. The Idaho Supreme Court found that by undertaking to place the safety mats which induced reliance by those in the building where the accident occurred, the defendant had assumed a duty. *Id.* at 352, 179 P.2d at 315. Defendant's duty of care arose not by virtue of the fact that it had a contractual duty to Bechtel, the place of employment for the plaintiff; rather, the contract was merely the means by which defendant

assumed a legal duty of care to third persons. 145 Idaho at 352, 179 P.3d at 315.


This case is instructive to our case when viewed in the context of the Agreement between First Rate and Switzer. In *Baccus*, the plaintiff relied on his employer for safe conditions at his place of employment, and the defendant assumed a duty by virtue of the contract between it and plaintiff's employer. In each of the instances set forth by the Plaintiffs in their Opposition, the POA interactions were with First Rate. First Rate, by virtue of its Agreement with Switzer, maintained the interior of unit #4624. Despite the interactions it had with First Rate regarding any issues at the complex, the POA took absolutely no action on the interior of unit #4624 because it did not have any authority to do so. Therefore, any duty which arose from their voluntary undertakings would be to First Rate or the Owners of the Residential Lots. There is no evidence to raise a genuine issue of material fact that the POA created a duty towards the Plaintiffs for its voluntary undertakings.

CONCLUSION

For the foregoing reasons, Defendant Sagecrest Multi-Family Property Owners' Association, Inc., respectfully request that this Court grant it summary judgment and dismiss all of Plaintiff's claims against this Defendant with prejudice.

DATED this 9 day of September, 2014.

MOORE & ELIA, LLP

By 
Michael J. Elia, Attorney for Defendant Sagecrest
Multi-Family Property Owners' Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of September, 2014, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

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SEP 24 2014

CHRISTOPHER D. RICH, Clerk
By LUCILLE DANSEREAU
DEPUTY

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, *et. al.*,
Plaintiffs,

Case No. CV-PI-2013-04325

vs.

**ORDER DENYING SWITZER
SUMMARY JUDGMENT**

SAGECREST MULTI-FAMILY
PROPERTY OWNERS, *et. al.*,
Defendants.

On July 16, 2014, Matthew Switzer Trust, Matthew Switzer, individually and as Trustee of Matthew Switzer Trust, (collectively "Switzer") moved for summary judgment. On August 7, 2014, the plaintiffs (collectively "Forbush/Halowell"), opposed and Switzer replied on August 21, 2014.

The Court heard argument on September 11, 2014, and took the matter under advisement. Based on the following, the Court denies summary judgment.

RELEVANT FACTUAL BACKGROUND

The Sagecrest Apartment Complex includes 48 separate buildings, each with four individual apartments. The separate buildings are owned by individuals or entities who are shareholders in Defendant Sagecrest Multi-Family Property Owners' Association ("Sagecrest POA"), a not-for-profit corporation. Defendant Switzer owns building number 46 and the four apartments within that building, including Apartment 4624. Switzer has owned these apartments since February 2008.

From 2006 to early 2010, Defendant H&H Properties¹ acted as the property manager at Sagecrest. During the time H&H Properties managed the Sagecrest Apartment Complex, H&H Properties had an oral agreement with Defendant Anfinson Plumbing to perform plumbing work

¹ The Court previously granted summary judgment and dismissed H&H Properties.

1 as needed. In April 2009, the tenant in Apartment 4624 contacted H&H Properties complaining
2 there was no hot water. H&H Properties contacted Anfinson Plumbing.
3

4 Anfinson Plumbing replaced the burner assembly in the gas-fired water heater in
5 Apartment 4624 but failed to install a thermocouple with the integrated thermal cut off switch
6 ("TCO"). An integrated thermal cut off switch is a safety device that Forbush/Halowell allege
7 would have prevented the carbon monoxide leak and their injuries in 2012. Instead, the plumber
8 allegedly replaced the burner assembly with a standard thermocouple without an integrated TCO.
9

10 On March 15, 2010, Sagecrest POA contracted with First Rate Property Management
11 ("First Rate"), to act as a property manager. Switzer and First Rate entered into a property rental
12 management agreement ("Switzer-First Rate Agreement") for First Rate to manage building 46
13 and the four apartments within that building, including Apartment 4624. The Switzer-First Rate
14 Agreement provides, in relevant part, as follows:
15

16
17
18
19 **2. APPOINTMENT OF AGENT**
20

21 2.1 OWNER hereby appoints AGENT as sole and exclusive agent of
22 OWNER to manage the PREMISES described in paragraph 2.2 upon the
23 terms and conditions provided herein. AGENT accepts the appointment and
24 agrees to furnish the services of its organization for the management of the
25 PREMISES.
26

27 2.2 The property to be managed by AGENT under this AGREEMENT (the
28 "PREMISES") is located at 1805 E. Overland Bldg. 46 #11. #12. #23 and
29 #24 the city of Meridian in the state of Idaho.
30

31 ***

32 2.5 OWNER authorizes AGENT to contract for services to include but not
33 limited to, water, sewer, garbage, gas, electric, irrigation, yard care,
34 maintenance agreements, and coin operated washer and dryers. OWNER to
35 assume the obligation of any contracts entered.
36

37 ***

38 **9. MAINTENANCE AND REPAIRS**
39

40 9.1 AGENT is authorized to make or cause to be made, through contracted
41 services or otherwise, all ordinary repairs and replacements reasonably
42 necessary to preserve and maintain the PREMISES in an attractive condition
43 and in good state of repair for the operating efficiency of the PREMISES,
44 and all alterations required to comply with lease requirements.... AGENT is
45 also authorized to purchase or rent, on OWNER's behalf, all equipment,
46 tools, appliances, materials, supplies, and other items necessary for the
47 management, maintenance, or operation of the PREMISES....AGENT shall

not be liable to OWNER for any act, omission, or breach of duty of such independent contractors or suppliers.

9.4 Agent shall contract for bi-annual Preventative Maintenance at the expense of the Owner. The contractor will check all plumbing and plumbing fixtures, caulking, door stops, dryer vents, smoke detectors, and furnace filters and make necessary repairs....

19. SPECIAL POWER OF ATTORNEY

KNOWN ALL MEN BY THESE PRESENTS; that the OWNER has made, constituted, and appointed and by these presents do make, constitute and appoint First Rate Property Management, Inc. and its agents, true and lawful attorney for and in their name, place and stated, and for their use and benefit as follows: (Idaho Code, Section 15-12-105)

19.2 ...to order, direct, superintend, and manage all repairs, alterations, and improvements...in general, to do and perform all acts and things incident to management of the PREMISES....

Switzer-First Rate Agreement.

On April 8, 2011, Adra Kipper leased Apartment 4624 in the Sagecrest Apartments, and executed a one-year rental agreement with First Rate ("Kipper-First Rate Agreement"). She renewed that agreement for one year on March 19, 2012. Adra Kipper was the sole occupant except for when her children or her boyfriend came to stay. The Kipper-First Rate Agreement provided, in relevant part, as follows:

THIS AGREEMENT, made and entered April 8th, 2011, between First Rate Property Management, Inc., as acting Agent for Owner of the below named property...

1. AGENT: Tenant understands that Landlord (First Rate) is the acting agent of the "Owner."

34. ENTRY AND INSPECTION. Landlord has the right to enter the Premises and Tenant agrees not to unreasonably withhold from the Landlord consent to exhibit the Premises to ...workmen, contractors...

39. REPAIRS AND MALFUNCTIONS. All service or repairs, which fall within the responsibility of the Landlord, shall be requested in writing. Tenant shall not make repairs or hire contractors to make repairs. Landlord shall respond to the emergency maintenance request, as soon as possible. For the

1 purposes of the this Rental Agreement, emergency maintenance is . . . smell of gas.
2 Tenant is directed to call 911 for emergencies causing immediate danger such as
3 fire. . . . Tenant agrees to attempt to remedy the below maintenance issues prior
4 to notifying Landlord:

5 ***

6
7 5. **No hot water:** Check thermostat on tank for proper temperature setting. Check
8 that thermostat is not set to "vacation". Check and reset breaker in power panel.
9 Check and reset button next to thermostat.

10 ***

11 **41. ACCESS FOR REPAIRS:** Tenant hereby agrees, requests, and authorizes
12 Landlord to allow maintenance contractors and personnel to check out a key from
13 Landlord with the sole purpose to gain access to the property to make necessary
14 repairs....

15
16 (Emphasis in the original.) Kipper did not have any contact directly with Switzer and dealt only
17 with First Rate.

18
19 On November 9, 2011, First Rate employee, Tara Gaertner, emailed Sagecrest owners,
20 including Switzer, regarding a number of maintenance matters, including water heater and carbon
21 monoxide concerns in several buildings at Sagecrest. That email that provided, in relevant part, as
22 follows:
23

24
25 Attention Owners: . . .

26 ***

27 Below are the recommendations from the HVAC engineer to solving the CO
28 problem in the units.

29 A. Increase the fresh air intakes for all floor plans by adding louvers to
30 the closet doors for ALL floor plans. \$187.50 per unit.

31
32 B. Replace existing water heater with one that has side vents for ALL
33 floor plans. \$650.

34 C. Replace the smoke detectors with CO/Smoke detector combination
35 sensor. \$62.48 per unit.

36
37 All of these recommended repairs are to help prevent the possibility of carbon
38 monoxide entering the unit. These recommendations come from a report obtained
39 by your association from a HVAC engineer evaluation.

40 Again, this work is highly recommended. Please let me know what you would like
41 to have done and I can get that scheduled as soon as possible.
42
43
44
45
46
47

1 Switzer replied by email that same day, in relevant part, as follows:

2 11-9-11

3
4 Hi Tara,

5 I did not know we had a CO problem in the units. Would you let me know if
6 my water heaters have a pressure release valve? The older models don't, but newer
7 ones usually come with it. I'm not worried about a water heater with side vents due
8 to cost.
9

10 I appreciate the heads up on these preventative maintenance measures. I'm trying
11 to weigh costs vs benefits. Any help you can offer is appreciated. What is the
12 general consensus among the other owners?

13 Gaertner replied to Switzer's email stating "(a)ll of your water heaters checked in good during the
14 CO detecting. We will be doing that again in November. I will let you know if there are any
15 problems."
16

17 Gaertner testified that she might have contacted Switzer by phone sometime on March 9,
18 2012, regarding high readings of carbon monoxide in Apartment 4624 but Switzer testified he
19 was not contacted. Switzer's phone records do not show any calls to or from a 208 area code in
20 the month of March, 2012.
21

22 In early 2012, First Rate posted a written notice on tenant doors, including Adra Kipper's
23 door, alerting them to the fact that there were higher levels of carbon monoxide escaping through
24 the vent on top of the water heater. That notice provided as follows:
25

26
27
28
29 **IMPORTANT!**

30 Upon our recent inspections of the water heaters at Sagecrest we have found that
31 your unit shows higher levels of carbon monoxide than we would like to see. The
32 carbon monoxide is exiting through the vent on the top of the water heater but does
33 have the potential of entering the unit. It is very important if you run your dryer to
34 keep the bi-fold doors open at all times. We have provided carbon monoxide
35 detectors for safety precautions until your water heater can be replaced next week.
36 Please read the instructions so it is properly placed in your apartment and you are
37 aware of how it operates. Please do not attach them to the walls since they will be
38 picked up once your water heater is replaced. The owner of your property has been
39 informed of the situation. They are scheduled for replacement starting on Monday
40 until the job is complete. Please also consider this your notice of intent to enter for
41 the replacement. We do not have a firm schedule of what units will be completed
42 when but are trying our best to do them quickly. If the carbon monoxide detector
43 goes off please open all windows and contact Intermountain Gas at 377-6840. For
44 extra safety precautions it wouldn't hurt to sleep with a couple windows open. If
45
46
47

1 you would like to shut your water heater off you may turn it to "vacation" but you
2 will not have hot water. Please call if you have any further questions or concerns.
3 Thank you for your understanding while we all work to get this matter resolved.

4 First Rate provided carbon monoxide detectors, but the detector in Apartment 4624 did not work.
5
6 The tenants were told First Rate would replace defective water heaters "next week," but as of
7
8 November 10, 2012, the time of Forbush's death, the water heater in Apartment 4624 had not
9 been replaced.

10 On November 10, 2012, eighteen-year-old Private First-Class McQuen C. Forbush, who
11 was home on leave from the United States Marine Corps., and Breanna Halowell, who was also
12 eighteen at this time, stayed at the Sagecrest Apartments, Apartment 4624 as Kipper's invited
13 guests. Plaintiffs' Travis Forbush and Gretchen Hymas are Forbush's natural parents. On
14 November 10, 2012, Forbush died from carbon-monoxide poisoning. Halowell was holding
15 Forbush when he died and suffered severe injuries herself. It is undisputed that Halowell and
16 Forbush were never told about carbon monoxide emissions, water heater concerns or problems
17 with the carbon monoxide detector related to Apartment 4624.
18
19

20 Forbush/Halowell sued Switzer, as the owner of the apartment, (as well as others) and
21 Switzer moved for summary judgment.
22

23 ANALYSIS

24 Summary judgment is appropriate where "the pleadings, depositions, and admissions on
25 file, together with the affidavits, if any, show that there is no genuine issue as to any material fact
26 and that the moving party is entitled to a judgment as a matter of law." *Beaudoin v. Davidson*
27 *Trust Co.*, 151 Idaho 701, 704, 263 P.3d 755, 758 (2011), *quoting* I.R.C.P. 56(c). The burden is
28 on the moving party to show that no genuine issues of material fact exist. *Soignier v. Fletcher*,
29 151 Idaho 322, 324, 256 P.3d 730, 732 (2011), *citing* *Stoddart v. Pocatello Sch. Dist. No. 25*, 149
30 Idaho 679, 683, 239 P.3d 784, 788 (2010). Disputed facts are "liberally construed in favor of the
31 nonmoving party and 'all reasonable inferences that can be drawn from the record are to be drawn
32 in favor of the nonmoving party.'" *Patterson v. State of Idaho, Dep't of Health Welfare*, 151
33 Idaho 310, 315, 256 P.3d 718, 723 (2011), *quoting* *Mackay v. Four Rivers Packing Co.*, 145
34 Idaho 408, 410, 179 P.3d 1064, 1066 (2008). "If reasonable people might reach a different
35 conclusion from conflicting inferences based on the evidence," then the summary judgment
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1 motion must be denied. *Cramer v. Slater*, 146 Idaho 868, 873, 204 P.3d 508, 513 (2009), citing
2
3 *Mackay*, 145 Idaho at 410, 179 P.3d at 1066.

4 Once the moving party establishes the absence of a genuine issue of fact, the burden shifts
5 to the nonmoving party to produce admissible evidence, which sets forth specific facts showing
6 the existence of a genuine issue of fact on the elements challenged by the moving party. I.R.C.P.
7 56(e); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720–21, 791 P.2d 1285, 1299–1300 (1990);
8 *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530–31, 887 P.2d 1034, 1037–38 (1994). An
9 opposing party may not merely rest on allegations contained in his pleadings nor may the
10 opposing party’s case rest on speculation or conclusory assertions. *Northwest Bec-Corp v. Home*
11 *Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002); *McCoy*, 120 Idaho at 769, 820 P.2d at
12 364. The party opposing the motion must produce evidence, by affidavit or otherwise, to show
13 that there is indeed a genuine issue for trial. I.R.C.P. 56(e); *Olsen*, 117 Idaho at 720, 791 P.2d at
14 1299.
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21 For the purposes of this summary judgment, the parties agree that whether First Rate acted
22 as Switzer’s agent is a question of fact over which there is a dispute precluding summary
23 judgment that First Rate was Switzer’s agent. In addition, the Court assumes that the 2009 repairs
24 to the water heater in Apartment 4624 failed to include a safety feature that would have prevented,
25 in part, the accident. However, Forbush/Halowell specifically concede that they are not
26 proceeding against Switzer based on any vicarious liability for Anfinson Plumbing’s 2009 repairs
27 because, in part, this Court dismissed claims against Switzer’s management agent in 2009, H&H.²
28 See Plaintiffs’ Response in Opposition to Switzer Motion for Summary Judgment, footnote 6; See
29 Fourth Amended Complaint, filed by stipulation, September 19, 2014.
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35 Therefore, the acts giving rise to the remaining claims against Switzer stem from
36 Switzer’s alleged failure to do the following:
37

38 To exercise reasonable care under all of the circumstances;
39

40 ² The Court’s decision dismissing H&H was limited to H&H’s liability to Forbush/Halowell and did not address or
41 concern the potential liability of any other party, including Switzer. The Court was not presented with the issue of
42 whether the owner/landlord, Switzer, was vicariously liable to the present tenant’s invitees, for repairs undertaken by
43 an independent contractor (Anfinson Plumbing) in 2009. See RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. §
44 17.7 (1977); RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 19.1 (1977); RESTATEMENT (SECOND) OF
45 PROPERTY, LAND. & TEN. § 19.3 (1977); RESTATEMENT (SECOND) OF TORTS § 419 (1965).
46

1 To provide and/or maintain the apartment in a safe and sanitary condition fit for
2 human habitation;

3 To provide and/or maintain the apartment's water heater, air handler, and heating
4 system in a reasonably safe condition;

5 To perform a reasonable inspection of the apartment – including a reasonable
6 inspection of the apartment's water heater and ventilation system after determining
7 the water heater was leaking carbon monoxide;

8 To test or confirm the carbon monoxide detectors were installed properly and
9 working after delivering carbon monoxide detectors to Apartment 4624;

10 To adequately warn of the unreasonably dangerous condition in apartment 4624;

11 To provide a safe and habitable living environment.

12 Fourth Amended Complaint, pages 13-15, 29-30, 33-34.

13
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15
16 Switzer moves for summary judgment dismissing these claims. Switzer claims Switzer
17 owed no duty of care to, or duty to warn, Forbush/Halowell because they were Kipper's guests.
18 Switzer also argues that Switzer did not owe a non-delegable duty to Forbush/Halowell to
19 maintain the premises in a habitable condition and did not owe a duty to provide or maintain
20 operating carbon monoxide detectors to Forbush/Halowell, as invited guests of a tenant.

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22
23
24 **A. There is a dispute of material fact whether Switzer owed a duty to**
25 **Forbush/Halowell precluding summary judgment.**

26
27 In order to establish a cause of action for negligence, a plaintiff must establish: (1) a duty,
28 recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a
29 breach of duty; (3) a causal connection between the defendant's conduct and the resulting injury;
30 and (4) actual loss or damage. *Robinson v. Mueller*, 156 Idaho 237, 322 P.3d 319, 321 (Ct. App.
31 2014) (citing *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999)). "No liability
32 exists under the law of torts unless the person from whom relief is sought owed a duty to the
33 allegedly injured party." *Jones v. Starnes*, 150 Idaho 257, 260, 245 P.3d 1009, 1012 (2011)
34 (quoting *Vickers v. Hanover Constr. Co., Inc.*, 125 Idaho 832, 835, 875 P.2d 929, 932 (1994)).
35 The existence of a duty is a question of law. *Turpen*, 133 Idaho at 247, 985 P.2d at 672.

36
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39
40 Claims stemming from a condition on property impose certain duties on the landowner,
41 called premises liability. *Jones v. Starnes*, 150 Idaho 257, 261, 245 P.3d 1009, 1013 (2011);
42 *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 713, 8 P.3d 1254, 1256 (2000).

1 Forbush/Halowell claim their injuries occurred due to a condition on Switzer's property – a faulty
2 water heater that caused their carbon monoxide poisoning. Whether that duty extends to
3 Forbush/Halowell depends on their status.
4

5 The duty owed by owners and possessors of land depends on the status of the
6 person injured on the land—that is, whether he or she is an invitee, licensee, or
7 trespasser. *Ball v. City of Blackfoot*, 152 Idaho 673, 677, 273 P.3d 1266, 1270
8 (2012).
9

10 *Robinson v. Mueller*, 156 Idaho at ___, 322 P.3d at 321.
11

12 A social guest is a licensee, and the duty owed a social guest is not the same as that owed
13 to the tenant; it is very limited. *Id.* (citing *Holzheimer v. Johannesen*, 125 Idaho 397, 400, 871
14 P.2d 814, 817 (1994)). Forbush/Halowell are social guests. In *Keller v. Holiday Inns, Inc.*, 105
15 Idaho 649, 671 P.2d 1112 (Ct. App. 1983), *vacated on other grounds*, 107 Idaho 593, 691 P.2d
16 1208 (1984), the Idaho Supreme Court summarized the standard as follows:
17

18 A person who enters the property of another with passive permission or as a mere
19 social guest traditionally has been held to understand that he must take the land as
20 the possessor uses it. This entrant, classified by the law as a licensee, is expected to
21 be alert and to protect himself from the risks he encounters. Accordingly, the duty
22 owed to a licensee with respect to such risks is narrowly restricted. The possessor
23 is required simply to share his knowledge of dangerous conditions or dangerous
24 activities with the licensee. When such a warning has been given, the possessor's
25 knowledge is no longer superior to that of the licensee, and the possessor's duty
26 extends no farther. Of course, the possessor must avoid willful and wanton injury
27 to the licensee. *But ordinary negligence allowing an unsafe condition or activity*
28 *on the property is insufficient, by itself, to impose liability to a licensee.*
29
30

31 *Robinson v. Mueller*, 156 Idaho at ___, 322 P.3d at 322 (quoting *Keller*, 105 Idaho at 652–53, 671
32 P.2d at 1115–16)(emphasis added). *See also Harrison v. Taylor*, 115 Idaho 588, 595–96, 768 P.2d
33 1321, 1328–29 (1989). Thus, to the extent Forbush/Halowell base any claims against the landlord,
34 Switzer, on ordinary negligence, those claims fail. *Id.*
35
36

37 Furthermore, only the entity or person having control over the property (Adra Kipper)
38 bears the burden of *warning* social guests of dangerous conditions on the property. *Robinson v.*
39 *Mueller*, 156 Idaho at ___, 322 P.3d at 322. It is undisputed that both Forbush and Halowell were
40 social guests of the tenant, Adra Kipper. Therefore, while Kipper had a duty to warn
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1 Forbush/Halowell, Switzer, as the landlord, has no duty to warn Kipper's social guests. *Id.* Any
2 claim based on a duty to warn fails.
3

4 Likewise, a landlord generally is not "responsible for injuries to third persons in privity
5 with the tenant which are caused by failure to keep or put the demised premises in good repair."
6 *Robinson v. Mueller*, 156 Idaho at ___, 322 P.3d at 322-23 (quoting 62 AM.JUR. 2d *Premises*
7 *Liability* § 408 (2005)). *See also Harrison v. Taylor*, 115 Idaho 588, 595-96, 768 P.2d 1321,
8 1328-29 (1989); *Evans*, 112 Idaho at 401, 732 P.2d at 370; *Keller*, 105 Idaho at 651, 671 P.2d at
9 1114. However,
10
11

12 [A]s between a tenant's social guest and the landlord—the landlord owes a duty
13 only to the extent that, if the landlord *voluntarily undertakes repairs on the*
14 *premises, the landlord must exercise reasonable care in performing such repairs.*
15

16 *Robinson v. Mueller*, 156 Idaho at ___, 322 P.3d at 323 (emphasis added). Thus if Switzer (or its
17 agent) undertook repairs, it has a duty to the social guest to perform those repairs with reasonable
18 care. Therefore, the question is whether Switzer undertook repairs on the premises, and if it did,
19 whether it exercised reasonable care in performing those repairs.
20
21

22 Switzer contends there is no material dispute that it or First Rate voluntarily undertook
23 repairs; it claims it undertook no repairs. Switzer argues that it only indicated that at some
24 indeterminate time in the future it would undertake repairs – a promise for a future act. The Court
25 disagrees and finds that there is a dispute of material fact about whether Switzer, through First
26 Rate, undertook repairs and whether those repairs, once undertaken, were performed with
27 reasonable care.
28
29

30 First Rate clearly informed Kipper and other tenants it was entering her apartment to
31 replace the water heater in early 2012. The notice specifically indicates "[w]e have provided
32 carbon monoxide detectors for safety precautions until your water heater *can be replaced next*
33 *week.*" (Emphasis added.) The evidence is that First Rate began replacing water heaters and
34 installing hardwired carbon monoxide detectors throughout the apartment complex but had not
35 yet replaced Kipper's hot water heater or installed a hard wired carbon monoxide detector. While
36 this specific water heater had not been replaced, it is up to a jury to decide whether by beginning
37 to replace the water heaters globally in the complex, the landlord had begun those repairs for the
38 apartment complex, thus creating a duty to Forbush/Halowell.
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Premises liability is not the exclusive source of a landowner's duties. Forbush/Halowell claim that Switzer owed them a duty to provide or maintain the apartment in a habitable condition or provide specific safety devices – sometimes called the warranty of habitability. This warranty is of recent construction.

15 WILLISTON ON CONTRACTS § 48:11 (4th ed.) In Idaho, both the courts and the legislature have recognized a duty to provide a habitable rental property to the tenant both by statute and as a matter of public policy. *See* I.C. § 6-320.

According to the Idaho Supreme Court, Idaho Code section 6-320(a)(3) :

³ I.C. § 6-320 provides, in relevant part, as follows:

11

1 issue of whether one may recover under the specific provisions of I.C. § 6–320.
2 Certainly, it would not be the public policy of the state to allow landlords to
3 provide hazardous and unsafe premises to their tenants.

4 ***

5 *Bakker* tells us that a declaration of public policy in a statute is to be targeted to the
6 specific problem addressed by the Legislature and an expression of public policy in
7 a statutory provision does not necessarily extend to the entire code chapter in
8 which the expression is contained. *Bakker*, 141 Idaho at 189–90, 108 P.3d at 336–
9 37. Looking at Section 6–320(a)(3) in context, the provision states that the
10 “premises” are to be maintained in a non-hazardous condition, which necessarily
11 means the leased premises. That is, the landlord is obligated to maintain the
12 premises covered by the lease in a non-hazardous condition.

13
14 *Jesse v. Lindsley*, 149 Idaho 70, 76, 233 P.3d 1, 7 (2008). In other words, a landlord may be liable
15 to a tenant based on either the statute or as a matter of public policy.

16
17 However, there is nothing about the duty to provide a habitable rental to a tenant that
18 extends to the social guest. This policy does not change the case law recognizing that in Idaho a
19 “landlord generally is not “responsible for injuries to third persons in privity with the tenant
20 which are caused by failure to keep or put the demised premises in good repair.” *Robinson v.*
21 *Mueller*, 156 Idaho at ___, 322 P.3d at 322-23 (quoting 62 AM.JUR. 2d *Premises Liability* § 408
22 (2005)).

23
24 Therefore, the Court finds that Switzer had no duty to provide a habitable living
25 environment to Forbush/Halowell either as a matter of statute or as a matter of an implied
26 warranty of habitability.

27
28 **C. Whether First Rate was acting as an independent contractor or as Switzer’s**
29 **agent is irrelevant to whether Switzer may be liable for First Rate’s alleged**
30 **negligence.**

31
32 While the parties agree that First Rate’s status as either an independent contractor or as
33 Switzer’s agent is a question of fact, First Rate’s status may not be relevant to Switzer’s potential
34 liability for First Rate’s alleged failure to exercise reasonable care to make the property
35 reasonably safe. According to the Restatement of Property, a landlord may be liable for the acts of
36 an independent contractor.

37
38 A landlord who employs an independent contractor to perform a duty which the
39 landlord owes to his tenant to maintain the leased property in reasonably safe
40 condition is subject to liability to the tenant, and to third persons upon the leased
41

1 property with the consent of the tenant, for physical harm caused by the
2 contractor's failure to exercise reasonable care to make the leased property
3 reasonably safe.

4 RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 19.1 (1977).
5


6 The Switzer-First Rate Agreement clearly requires First Rate to "contract for bi-annual
7 Preventative Maintenance at the expense of the Owner. The contractor will check all plumbing
8 and plumbing fixtures, caulking, door stops, dryer vents, smoke detectors, and furnace filters and
9 make necessary repairs." Switzer-First Rate Agreement, ¶9.4. Thus, a jury could find that First
10 Rate was employed "to maintain the leased property in reasonably safe condition." Therefore,
11 applying the Restatement, Switzer's liability for First Rate's actions is not affected by its status as
12 an agent or independent contractor.
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17 CONCLUSION

18 Genuine issues of material facts exist. The Court denies summary judgment to Switzer.

19 **IT IS SO ORDERED.**
20

21 Dated this 24th day of September 2014.
22

23 
24 _____
25 Cheri C. Copsey, District Judge
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CERTIFICATE OF MAILING

I hereby certify that on this 24th day of September 2014, I mailed (served) a true and correct copy of the within instrument to:

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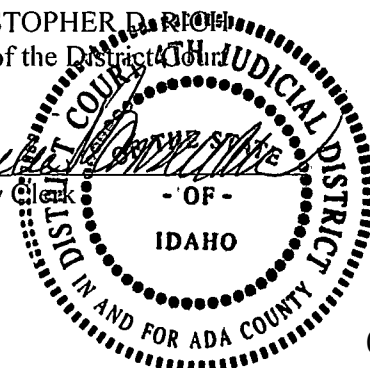
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CHRISTOPHER D. PROCTOR
Clerk of the District Court

By: 
Deputy Clerk



OCT 17 2014

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By STACEY LAFFERTY
DEPUTY

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

**MOTION FOR SUMMARY
JUDGMENT**

COME NOW the above-captioned Defendants, Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner, by and through their counsel of record, John M. Howell of the firm Brassey, Crawford & Howell, PLLC, and hereby this Motion for Summary Judgement. This Motion is based on Idaho R. Civ. P. 56, the record and pleadings filed in this matter, and the

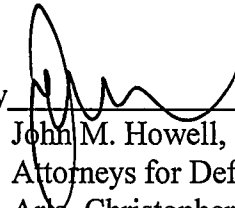
memorandum in support and Affidavits of Jon Kalsbeek, Jay Arla, Christopher Schwab, and David Meisner filed contemporaneously herewith.

Oral argument is requested.

DATED this 17th day of October, 2014.

BRASSEY, CRAWFORD & HOWELL, PLLC

By



John M. Howell, Of the Firm
Attorneys for Defendants Jon Kalsbeek, Jay
Arla, Christopher Schwab and David Meisner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2014, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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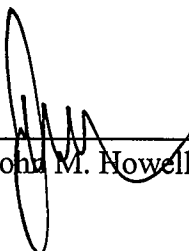
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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

AFFIDAVIT OF JON KALSBECK

NO. _____ FILED _____ 34
A.M. _____ P.M. _____

OCT 17 2014

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

Jon Kalsbeek, being first duly sworn upon oath, deposes and states as follows:

1. Your Affiant is 18 years of age and makes this affidavit based upon his own personal knowledge.
2. Attached hereto as Exhibit A is a true and correct copy of the Covenants, Conditions and Restrictions for Sagecrest.
3. In 2011, in response to concerns regarding carbon monoxide in some Sagecrest buildings, Sagecrest hired Engineering Consultants, Inc. to investigate and evaluate the concerns.
4. On March 9, 2012, Tara Gaertner informed me that she tested for carbon monoxide in apartment number 3724 and that she obtained a high reading. I was a member of the entity that owned apartment number 3724.
5. Thereafter, Ms. Gaertner further informed me that, at her request, Express Plumbing re-tested the apartment and Express Plumbing obtained no high or abnormal carbon monoxide reading.
6. I was confused by the discrepancy between First Rate Property Management's high carbon monoxide reading on March 9 and the normal carbon monoxide readings obtained by Express Plumbing. I was unaware that First Rate Property Management had no written carbon monoxide testing procedures.
7. I met with Intermountain Gas Company ("IGC") to discuss carbon monoxide testing procedures on March 19, 2012. IGC provided me with materials regarding procedures for carbon monoxide testing. I also obtained information regarding carbon monoxide testing procedures from sources on the Internet, including the U.S. Department of Energy.

8. On March 20, 2012 I met with First Rate employees to discuss carbon monoxide testing procedures at Sagecrest, and I provided them with the materials that I had gathered regarding carbon monoxide testing to First Rate.

9. Following the meeting, I exchanged several emails with First Rate employees and the other officers of the Sagecrest Property Owner's Association with respect to the development of written carbon monoxide testing procedures. Written carbon monoxide testing procedures were eventually developed and, to my understanding, were utilized by First Rate in testing for carbon monoxide at Sagecrest.

10. I discharged my duties as President of the Sagecrest Property Owner's Association in good faith.

11. I exercised the care of an ordinarily prudent person in a like position under similar circumstances.

12. I acted in the best interests of Sagecrest and its members.

13. I relied on information and reports provided by professionals based upon my reasonable belief that the information and reports were within the providing person or entity's professional competence.

14. At no point in time did I undertake any action, or decline to take any action, with the intent to inflict emotional harm on any of the Plaintiffs.

/

/

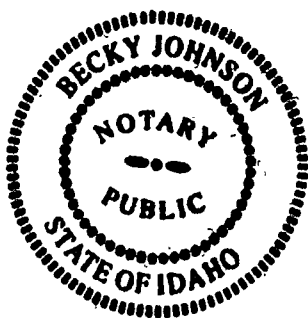
/

FURTHER YOUR AFFIANT SAITH NAUGHT.

Dated this 15th day of October, 2014.

By [Signature]
JON KALSBECK

SUBSCRIBED AND SWORN to before me this 15th day of October, 2014.



[Signature]
Notary Public for Idaho
Residing at Boise
Commission expires: 10/13/16

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2014, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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John M. Howell

ADA COUNTY RECORDER J. DAVID NAVARRO
BOISE IDAHO 11/18/04 11:48 AM
DEPUTY Bonnie Oberlin
RECORDED - REQUEST OF
First American

AMOUNT - 93.00

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31

Re-record to add Section 6.6A per Sagecrest Property Owners Association
**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS
OF THE MULTI FAMILY PORTION OF SAGECREST SUBDIVISION**

This Declaration of Covenants, Conditions and Restrictions is made effective this 18th day of November, 2004, by the Sagecrest Development, L.L.C., an Idaho limited liability company ("Declarant").

RECITALS

- A. Declarant is Sagecrest Development, L.L.C., which is the owner of certain real property in Ada County, Idaho, which is described in Exhibit A, and which is attached and incorporated by reference (hereinafter the "Property"), as further defined at Article II).
- B. The Property is the multi family portion of the plat of Sagecrest Subdivision. The other portions of the plat of Sagecrest Subdivision consist of a commercial section to the north of the Property and a commercial section to the east of the Property (collectively the "Commercial Sections of Sagecrest Subdivision").
- C. Sagecrest Subdivision is a re-plat of Lot 6 of Resolution Subdivision No. 1.
- D. Declarant has deemed it desirable to impose a general plan for the improvement and development of the Property by the adoption and establishment of covenants, conditions and restrictions upon the real property and each and every Residential Lot and portion thereof and upon the use, occupancy and enjoyment thereof; all for the purpose of enhancing and protecting the value, desirability and attractiveness of the Property.
- E. Declarant has deemed it desirable for the efficient preservation of the value, desirability and attractiveness of the Property, pursuant to the provisions of this Declaration, to create a non-profit corporation to which shall be delegated and assigned the powers of maintaining the Property as hereinafter provided, and administering and enforcing these covenants, conditions and restrictions and collecting and disbursing funds pursuant to the assessment and charges hereinafter created and referred to.

**ARTICLE I
DECLARATION**

Declarant hereby declares that each Residential Lot, parcel or portion of the Property, is and shall be held, sold, conveyed, leased, occupied and improved subject to the following terms, covenants, conditions, easements and restrictions, all of which are declared and agreed to be in furtherance of a general plan for the protection, maintenance, subdivision, improvement and sale of the Property, and to enhance the value, desirability and attractiveness of the Property. The terms, covenants, conditions, easements and restrictions set forth herein: (i) shall run with the land constituting the Property, and shall be binding upon all persons having or acquiring any

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
PORTION OF SAGECREST SUBDIVISION - 1**

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EXHIBIT

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right, title or interest in the Property or any Residential Lot, parcel or portion thereof; (ii) shall inure to the benefit of every Residential Lot, parcel or portion of the Property and interest therein; (iii) shall inure to the benefit of and be binding upon Declarant's successors in interest, and each grantee or Owner and such grantees or Owner's respective successors in interest; and (iv) may be enforced by Declarant, by any Owner or such Owner's successors in interest, or by the Association as hereinafter described.

The Commercial Sections of Sagecrest Subdivision are not subject to any of the terms, covenants, conditions, easements and restrictions set forth herein unless otherwise specifically indicated herein.

Notwithstanding the foregoing, no provision of this Declaration shall be construed as to prevent or limit Declarant's right to complete development of the Property and to construct improvements thereon, nor limit Declarant's right to maintain model units, construction, sales, or leasing offices or similar facilities (temporary or otherwise) on any portion of the Property, nor Declarant's right to post signs incidental to construction, sales or leasing activities.

Declarant hereby further declares that each Residential Lot, parcel or portion of the Property shall further be held, sold, conveyed, encumbered and subject to the Master Declaration, as defined in **Article II** below, except as otherwise provided herein.

ARTICLE II DEFINITIONS

Articles: The Articles of Incorporation of the Sagecrest Multi Family Property Owners' Association.

Assessments: Those payments required of Association Members, including Regular, Special and Limited Assessments of the Association, and as further required in the Master Declaration.

Association: The Sagecrest Multi Family Property Owners' Association, which Association shall be deemed to be a "Sub Association" as that term is defined and used in Master Declaration.

Association Rules: Those rules and regulation promulgated by the Association governing conduct upon and use of the Property under the jurisdiction or control of the Association; the imposition of fines, fees and forfeitures for violations of Association Rules and use of Common Areas, and procedural matters for use in the conduct of the business of the Association.

Board: The Board of Directors of the Association.

Bylaws: The Bylaws of the Association.

DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY PORTION OF SAGECREST SUBDIVISION - 2

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Common Areas: All real property, fixtures, personal property and Improvements owned, leased or otherwise held now or in the future by the Association exclusively for the common use and enjoyment of the Owners, including:

- (a) Lot 60, Block 1 of Sagecrest Subdivision (the "Driveway and Parking Lot"), which lot includes, without limitation, the asphalt driving and parking area, concrete planters and parking dividers, parking striping, drainage catch basins, grease traps, and drainage beds underneath the asphalt surfaced areas, and mailbox clusters; and
- (b) Lot 64, Block 1 of Sagecrest Subdivision (the "Recreational Center Lot"), which lot includes, without limitation, the recreation center building, play area, pool and its landscaped areas, which Recreational Center Lot shall become part of the Common Area only upon the Association's acquisition of the same from the Declarant, which acquisition shall be evidenced by a deed conveying the Recreational Center Lot to the Association. Until such time as the deed is placed of record, Records of Ada County, Idaho, ownership of the Recreational Center Lot shall be retained by the Declarant.
- (c) The Drainage Lot (Lot 42, Block 1 of Sagecrest Subdivision).

Declarant: The Sagecrest Development, L.L.C., or its successor in interest, or any person or entity to whom the rights under this Declaration are expressly transferred by Sagecrest Development, L.L.C., or its successor.

Declarant Control Period: The period commencing on the date on which this Declaration is first recorded with the Office of Recorder of Ada County, Idaho and ending upon the first to occur of the following:

- (a) When 100% of the total number of the Residential Lots on the Property are no longer owned by the Declarant; or
- (b) When, in its discretion, Declarant so elects in writing.

Declaration: This Declaration of Covenants, Conditions and Restrictions for Multi Family Portion of Sagecrest, as it may be amended from time to time.

Drainage Facilities: All drainage catch basins, grease traps, and drainage beds underneath the asphalt surface areas, together with the Drainage Lot.

Four Plex: A residential building on each Residential Lot of the Property that is comprised of four separate single family residential units.

Improvement: Any structure, facility or system, or other improvement or object, whether permanent or temporary, which is erected, constructed or placed upon, under or in any portion of the Property, including but not limited to the Four Plexes, fences, driveways, Sidewalks, bicycle

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paths, curbs, landscaping, signs, lights, mail boxes, electrical lines, pipes, pumps, ditches, waterways, drainage facilities, and fixtures of any kind whatsoever.

Lot: Any numbered Lot of land shown on the Multi Family Portion of the Plat.

Master Declaration: Master Declaration of Covenants, Conditions, Restrictions and Easements for Resolution Subdivision, as recorded with the Ada County Recorder's Office on September 25, 2001, as instrument number 102092801, and as may be hereafter amended. Said Master Declaration is incorporated herein by reference. When used in this Declaration the terms which are defined in the Master Declaration shall have the same meanings ascribed to them therein; provided, however, that any term defined in this Declaration shall have the meaning given herein.

Member: Each person or entity holding a membership in the Association.

Multi Family Portion: That portion of the Plat that consists of forty-eight (48) Residential Lots each improved with a Four Plex, the Recreational Center Lot, that portion of the Driving and Parking Lot that is contiguous to the Residential Lots, and the Drainage Lot.

Owner: The person or other legal entity, including Declarant, holding fee simple title of record to a Residential Lot and buyers under executory contracts of sale, but excluding those having an interest merely as security for the performance of an obligation.

Person: Any individual, partnership, corporation or other legal entity.

Plat: The plat of Sagecrest Subdivision as recorded at the office of Ada County Recorder, State of Idaho, which plat includes the Property.

Property: The real property described in Exhibit A.

Resolution Business Park, LLC: The Developer/Owner who executed the Master Declaration.

Resolution Business Park POA: The Resolution Business Park Property Owners' Association, Inc., an Idaho non-profit corporation.

Residential Lots: All Lots on the Multi Family Portion of the Plat, except the Recreational Center Lot, the Driving and Parking Lot, and the Drainage Lot.

Sidewalks: Any sidewalks and pedestrian paths on the Property, including the sidewalks that are on the Residential Lots in front of the Four Plexes and the perimeter sidewalk on the Residential Lots that is on the easterly, southerly and westerly perimeter of the Property.

Structure: The term "Structure" shall include all Four Plexes, all Improvements to the Recreational Center Lot, including the recreational center, pool and play area; and all asphalted areas, including the Driveway and Parking Lot.

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Subdivision: Multi Family Portion of Sagecrest Subdivision.

Tenant: Any person occupying a residential unit in a Four Plex, other than an Owner.

ARTICLE III NATURE OF OWNERSHIP/MAINTENANCE

3.1 Title: Title to a Residential Lot may be held or owned by any person or entity and in any manner in which title to any other real property may be held or owned in the State of Idaho.

3.2 Inseparability: No ownership of a Residential Lot may be further divided and shall always be conveyed, devised, encumbered and otherwise affected only as a completed Lot. Notwithstanding the foregoing, it is contemplated that the Owner of any Four Plex will lease to separate Tenants the individual residential units of the Four Plex.

3.3 Maintenance of Lots and Four Plexes.

A. The Association shall maintain the following:

1. The following portions of the exterior of each Four Plex: siding, structural portions of the Four Plexes, street lamps mounted on the Four Plexes, and all other exterior surface areas, including the entry way, exterior stairs, railings and decks, and roofs.
2. All Sidewalks on the Property.
3. All landscaping on the Property, including, without limitation, all grass areas, shrubs, trees and bushes that are on Residential Lots and the Recreational Center Lot, and all planters, whether they are on Residential Lots or in the Common Area.
4. Drainage Facilities, including the Drainage Lot.
5. The Common Areas.
6. Any perimeter fence.
7. The main lines, service lines, valves, and sprinkler heads of the PUIS on the Property to the extent that they are not maintained by the Nampa Meridian Irrigation District.

B. The Owner shall maintain the following:

1. The following portions of the exterior of each Four Plex: windows, doors, exterior air conditioning units and all other exterior maintenance not performed by the Association; and
2. The entire interior of the Four Plexes, including but not limited to flooring, ceilings, walls and wall coverings, appliances, plumbing and plumbing fixtures, electrical system and fixtures, all interior components of the heating and air conditioning system.

C. Cost of Maintenance:

1. The cost of all maintenance performed by the Association shall be included as part of the Owner's Regular Assessments, as provided at Sections 7.2 and 7.3, except to the extent that the cost of any such maintenance materially exceeds the cost for similar maintenance on other Residential Lots and Four Plexes. Such excess cost may be charged to the Owner as a Limited Assessment in the Board's discretion.
2. The cost of all maintenance required to be performed by the Owner shall be paid for by the Owner.

D. Condition of Lots and Four Plexes. Each Residential Lot and Four Plex, and any and all Improvements from time to time located thereon or therein, shall be maintained in good condition and repair.

3.4 Utilities: Each unit of each Four Plex will be separately metered for electricity and gas. Notwithstanding the separate meters and any lease obligation of the Tenants to pay for their utilities, the Owner shall be responsible for all sewer, water, electrical, gas, and real property taxes associated with the Owner's Four Plex. The Association shall pay for trash service associated with the units of the Four Plexes.

3.5 Owner's Right with Respect to Interiors: Each Owner shall have the exclusive right to paint, repair, tile, wash, paper or otherwise maintain, refinish and decorate the interior portions of their Four Plex, except that Owners shall obtain the consent of the Association with regard to window treatments which are visible from the exterior of the Four Plex, the color, texture and materials of which shall correspond with the general color and architectural scheme of the Property.

3.6 Easements for Access for Repair, Maintenance: The Association is hereby granted an irrevocable easement for purposes of access to and upon each Residential Lot and Four Plex, during reasonable hours and as necessary for the maintenance and repair of the Residential Lot and Four Plex located thereon.

3.7 Restriction on Exterior Construction: No building, fence, wall, or other structure, or any landscaping or other Improvement shall be commenced, erected, altered, or maintained upon the Property, nor shall any exterior additions thereto or change or alteration therein be made until and without the express prior written consent of the Board of Directors, which consent can be withheld for any reason. This Article shall not affect or in any way be applicable to the Declarant, insofar as the Declarant's full development and construction of the Property is concerned.

3.8 Failure of Owner to Maintain such Owner's Residential Lot or Four Plex: In the event the Owner of any Residential Lot improved with a Four Plex shall fail to maintain any portion of such Owner's Residential Lot that *Owner is responsible to maintain*, in a manner reasonable satisfactory to the Board, after approval by vote of at least sixty percent (60%) of the members of the Board present and voting and subject to such Owner's right to notice and a hearing before the Board, the Association may, through its agents and employees, enter upon the Residential Lot or Four Plex and repair, maintain and restore the Residential Lot, or the Four Plex. The cost of such repair, maintenance and restoration shall be chargeable to the Owner of such Residential Lot or Four Plex and shall constitute a lien on the Residential Lot of such Owner, collectible in the same manner as Limited Assessments under this Declaration.

3.9 Exemption for Declarant: The activities of Declarant in the development, construction, ownership, sale and leasing of any Residential Lots, Four Plexes, or other portions of the Property or Improvements erected upon any such portion of the Property shall not be deemed to violate any provision of this Article III.

ARTICLE IV RESOLUTION SUBDIVISION RESTRICTIONS

4.1 Resolution Business Park POA Agreement: By acceptance of a deed to any Residential Lot in the Property each owner of such Residential Lot hereby acknowledges that the Property is subject to the Master Declaration and that the Declarant has sought an agreement with the Resolution Business Park, LLC seeking its approval that the following provisions would apply to the Multi Family Portion of Sagecrest Subdivision, **BUT THAT NO SUCH AGREEMENT HAS YET BEEN REACHED AND DECLARANT MAKES NO REPRESENTATION THAT SUCH AN AGREEMENT WILL BE REACHED:**

- A. The Association is a Sub-Association as that term is defined and used in the Master Declaration. There will be one or more property owner associations for the Commercial Sections of Sagecrest Subdivision, which association(s) will also be a Sub-Association, as that term is defined in the Master Declaration.
- B. Except as provided in Section 4.2, the Residential Lots will not be subject to the Resolution Business Park POA Assessments.
- C. Irrigation water will be provided to the Residential Lots by the pressurized irrigation system (PUIS) developed by the Resolution Business Park, LLC, and owned by Nampa Meridian Irrigation District. In addition to the Assessment

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provided for in Section 4.2, if the Association is billed for the Property's share of irrigation water, maintenance and operations by the Nampa Meridian Irrigation District, the Association will include such share in the Association's regular Assessments, more particularly described in Section 7.3.

- D. The Declarant has submitted a complete set of construction plans, including a site plan with setbacks, elevations, landscape plan, drainage plan (collectively the "Construction Plans") for three models of Four Plexes. Resolution Business Park, LLC, on behalf of the Architectural Control Committee under the Master Declaration has approved the Construction Plans. Only three Four Plex models and the planned improvements to the Recreation Center Lot are approved, and the approval requirements set forth in the Master Declaration are considered to be met with respect to these Construction Plans.

4.2 Limited Payment of Resolution Business Park POA Assessments: Pursuant to the Master Declaration, the Association shall be assessed, at a minimum, and shall pay twenty percent (20%) of the total of (i) the landscape maintenance for the perimeter landscaping along Overland Road and Millennium Blvd., installed by the Resolution Business Park, LLC (including lighting within the landscaped areas) and (ii) pressurized irrigation and maintenance and operation expenses associated with the perimeter landscaping on Overland Road and Millennium Blvd. The remaining ten percent (10%) [bringing it to a total of thirty percent (30%)] of such items shall be paid by the Sub-Association(s) of the Commercial Sections of Sagecrest Subdivision.

ARTICLE V CERTAIN RESTRICTIONS APPLICABLE TO RESIDENTIAL LOTS AND FOUR PLEXS

In addition to all other covenants contained in this Declaration, the use of each and every Residential Lot and Four Plex is subject to the following:

5.1 Use as a Multi Family Dwelling: Each Residential Lot and Four Plex shall be used as multi family residential use and for no other purposes.

5.2 Signs: No signor billboard of any kind shall be displayed to the public view on any Residential Lot or Four Plex except for:

- A. Directional and identification signs established by the Declarant, Association or the Board.
- B. After the termination of the Declarant Control Period, no signs, including signs for rent or for sale, shall be placed on any Residential Lot or on any Four Plex. Rather, the Board may provide an area within the Recreational Center for posting of advertisements, advertising Four Plexes for sale, and/or units within the Four Plexes for rent.

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C. At both the Overland Rd. and Millennium Way entrance to Sagecrest Subdivision, the Declarant shall install a monumental sign identifying the "Sagecrest Apartments" and directing interested Tenants, or potential purchasers, to the "for sale" and "for rent" information contained in the Recreational Center.

D. Subject to rules and limitations established by the Declarant or by the Board, small address plates identifying the address of units in the Four Plexes.

5.3 Temporary Structures, Vehicles, Etc.:

A. No building of a temporary character or trailer, tent, or out-buildings shall be placed upon the Property or used on or in connection with any Residential Lot or any Four Plex at any time, either temporarily or permanently; and

B. No trailer, motor home, truck (other than a ½ ton pickup truck), camper, boat or similar vehicle or equipment shall be permitted to be kept or parked upon the Property.

5.4 Antennas: No towers, antennas, aerials, or other facilities for the reception or transmission of radio or television broadcasts or other means of communication shall be erected and maintained or permitted to be erected and maintained on the Property.

5.5 Fences: Excepting the perimeter fence installed by the Declarant, no other fences shall be erected and maintained, or permitted to be maintained on the Property.

5.6 Mailboxes: Declarant will construct mailbox clusters in number and location as acceptable to the U.S. Postal Service, which clusters will provide a locked mailbox for each unit of each Four Plex. No other mailboxes shall be permitted.

5.7 Trash: The Owner shall be responsible for insuring that the Owner's Residential Lot is free from garbage and other debris, except landscape materials. The Association shall provide designated areas for the Owner and their Tenants to drop off trash for trash pick up service.

5.8 Animals and Pets: Each Owner shall conform with rules and regulations respecting dogs, cats and other pets and animals, as established from time to time by the Board.

5.9 Laws and Ordinances: Each Owner shall promptly comply with all laws, statutes, ordinances, rules and regulations of Federal, State, or municipal governments or authorities applicable to use, occupancy, construction and maintenance of such Owner's Residential Lot and Four Plex.

5.10 Leases by Owners: Each Owner shall have the right to lease units in their Four Plex. However, any such lease shall conform with the rules and regulation as established from time to time by the Board.

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5.11 Parking and Auto Repair. No automobiles or other vehicles shall be parked in any street or upon any portion of the Property except within the stripped parking areas, or carport, if any, designated as such by the Board. No Tenants or Owner shall park at any one time more than two vehicles anywhere on the Property, including in the designated parking areas. No work on automobiles or other vehicle repair shall be performed in any visible or exposed portion of the Property except in emergencies.

5.12 Abandoned, Inoperable or Oversized Vehicles: Abandoned or inoperable automobiles or vehicles of any kind, except as provided below in this Section 5.9, shall not be stored or parked on any portion of the Property. A written notice describing the "abandoned or inoperable vehicle" and requesting its removal may be personally served upon the owner of such vehicle or posted on the vehicle. If such vehicle has not been removed within thirty-six (36) hours after such notice, or other reasonable notice has been given, the Association shall have the right to remove the vehicle without liability, and the expense of removal and storage shall be charged against the owner of the vehicle.

5.13 Noxious Activities: No noxious or offensive activity shall be carried on upon any Residential Lot or Four Plex nor shall anything be done or placed thereon which may be or become a nuisance, or cause unreasonable embarrassment, disturbance or annoyance either to any other Owner or Tenant in their enjoyment of their Residential Lot or Four Plex unit, the Common Area, or the Sidewalks.

5.14 Nuisances. No rubbish or debris of any kind shall be placed or permitted to accumulate anywhere upon the Property and no odor shall be permitted to arise therefrom so as to render the Property or any portion thereof unsanitary, unsightly, offensive or detrimental to the Property or to the Owners or Tenants. No noise or other nuisance shall be permitted to exist or operate upon any portion of the Property so as to be offensive or detrimental to the Property or to the Owners' Tenants. Without limiting the generality of any of the foregoing provisions, no exterior speakers, horns, whistles, bells or other sound devices (other than security devices used exclusively for security purposes), flashing lights or search lights, shall be located, used or placed on the Property without the prior written approval of Declarant during the period of Declarant Control, or, thereafter, of the Board.

5.15 Limitations on Application of Restrictions: The restrictions set forth in this Article V shall not apply to Declarant, or Declarant's designated successors and assigns until the expiration of the Period of Declarant Control.

5.16 Declarant's Exception: Notwithstanding anything to the contrary contained in this Declaration, Declarant shall have the fullest latitude to develop the Property and to sell the Residential Lots improved with Four Plexes or to lease units therein without reservation, except as imposed by applicable zoning, subdivision, and other land use laws. Declarant may make such use of the unsold or unleased Four Plexes and Residential Lots as may facilitate the construction, improvement, sale and leasing of the Property, including, but not limited to, the maintenance of a sales and rental office, the showing of portions of the Property, and the display of signs. Declarant shall have an easement over the Property for ingress, egress and parking for

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itself, its agents, employees and prospective buyers of Residential Lots improved with Four Plexes.

ARTICLE VI SAGECREST MULTI FAMILY SUBDIVISION PROPERTY OWNERS' ASSOCIATION

6.1 Organization: The Sagecrest Multi Family Property Owners' Association ("Association") shall be initially organized by Declarant as an Idaho, non-profit corporation. The Association is charged with the duties and vested with the powers prescribed by law and set forth in the Articles, Bylaws, and this Declaration. Neither the Articles nor Bylaws shall, for any reason, be amended or otherwise changed so as to be inconsistent with this Declaration. In the event that there should exist any ambiguity in any provision of the Articles or Bylaws, then such provision shall be construed, to the extent possible, so that such provision shall be interpreted so as to be consistent with the provisions of this Declaration.

6.2 Membership: Every person or entity who is a record Owner of a fee or undivided fee interest in any Residential Lot shall be a Member of the Association. Membership shall be appurtenant to and may not be separated from the fee Ownership of any Residential Lot. Ownership of such Residential Lot shall be the sole qualification for membership. Transfer of a Residential Lot shall automatically transfer membership in the Association.

6.3 Association Control: Until the termination of the Declarant Control Period, the Declarant, or the Declarant's successor or assignee, shall have the exclusive control of the Association and the Owners, excluding the Declarant, shall not have the right to vote on any matters involving the operation of the Association or the Association's exercise of its authority. On and after the termination of the Declarant Control Period, the membership shall be franchised and each Member shall be entitled to one vote for each Lot owned.

6.4 Voting Rights: The Association shall have one (1) class of voting members, which shall consist of all Owners, who shall be entitled to one (1) vote for each Residential Lot owned, subject to the restriction contained in section 6.3. When more than one person or entity holds an interest in any Residential Lot, all such persons, or the entity as the case may be, shall be entitled to all rights and privileges of membership. The vote for such Residential Lot shall be exercised as its Owners collectively determine, but in no event shall more than one (1) vote be cast with respect to any Residential Lot.

6.5 No Fractional Votes, Severance of Voting Rights: Fractional votes shall not be allowed. In the event that joint Owners are unable to agree among themselves as to how their vote or votes shall be cast, such Owners shall lose their right to vote on the matter being put to a vote. When an Owner casts a vote, it will thereafter be presumed conclusively for all purposes that such Owner was acting with authority and consent of all joint Owners of the Residential Lot(s) from which the vote derived. The right to vote may not be severed or separated from the Ownership of the Residential Lot to which it is appurtenant, except that any Owner may give a revocable proxy, or may assign such Owner's right to vote to a property manager or Tenant of the Four Plex concerned, for the term of the lease or the term of the management contract. Any

sale, transfer or conveyance of such Residential Lot to a new Owner shall operate automatically to transfer the appurtenant voting right to the Owner.

6.6 Board of Directors and Officers: The affairs of the Association shall be conducted and managed by the Board of Directors (Board) and such officers as the Board may elect or appoint, in accordance with the Articles and Bylaws, as the same may be amended from time to time. The Board of the Association shall be elected in accordance with the provisions set forth in the Association Bylaws.

6.7 Powers and Duties of Association.

A. Powers. The Association shall have all the powers of a corporation organized under the non-profit corporation laws of the State of Idaho, subject only to such limitations upon the exercise of such powers as are expressly set forth in the Articles, the Bylaws, and Declaration. The Association shall have the power to do any and all lawful things which may be authorized, required or permitted to be done by the Association under Idaho law and under this Declaration, and the Articles and Bylaws, and to do and perform any and all acts which may be necessary to, proper for, or incidental to the proper management and operation of the Association's affairs and the performance of the other responsibilities herein assigned, including, without limitation:

1. Assessments. The power to levy Assessments on any Owner or any portion of the Property and to force payment of such Assessments, all in accordance with the provisions of this Declaration.
2. Right of Enforcement. The power and authority from time to time in its own name, on its own behalf, or on behalf of any Owner who consents thereto, to commence and maintain actions and suits to restrain and enjoin any breach or threatened breach of this Declaration or the Articles or the Bylaws, including the Association Rules adopted pursuant to this Declaration, and to enforce by injunction or otherwise, all provisions hereof.
3. Delegation of Powers: The authority to delegate its powers and duties to any person, firm or corporation, specifically including a property management company and/or a home owners' association management company. Neither the Association nor the members of its Board shall be liable for any omission or improper exercise by any person or entity of any such duty or power so delegated.
4. Association Rules: The power to adopt, amend and repeal by majority vote of the Board such rules and regulations as the Association deems reasonable. Provided, however, that any Association Rules shall apply equally to all Owners and Tenants and shall not be inconsistent with this Declaration, the Articles or Bylaws. A copy of the Association Rules as

they may from time to time be adopted, amended or repealed, shall be mailed or otherwise delivered to each Owner. It shall be the responsibility of the Owner to distribute a copy of the Association Rules to each of the Owners' Tenants, if any. Upon such mailing or delivery, the Association Rules shall have the same force and effect as if they were set forth in and were a part of this Declaration. The Association shall post a copy of the Association Rules in a conspicuous place in the recreation center. In the event of any conflict between such Association Rules and any provisions of this Declaration, or the Articles or Bylaws, the provisions of the Association Rules shall be deemed to be superseded by the provisions of this Declaration, the Articles or the Bylaws to the extent of any such inconsistency. During the period of Declarant Control, all rules must be approved by Declarant in order to become effective.

5. Duties: In addition to duties necessary and proper to carry out the powers delegated to the Association by this Declaration, and the Articles and Bylaws, without limiting the generality thereof, the Association or its agent, if any, shall have the authority and the obligation to conduct all business affairs of the Association and to perform, without limitation, each of the following duties:
- (a) Insurance. Obtain insurance from reputable insurance companies authorized to do business in the State of Idaho, and maintain in effect any insurance policy the Board deems necessary or advisable.
 - (b) Rule Making. Make, establish, promulgate, amend and repeal such Association Rules as the Board shall deem advisable.
 - (c) Enforcement of Restrictions and Rules. Perform such other acts, whether or not expressly authorized by this Declaration, as may be reasonably advisable or necessary to enforce any of the provisions of the Declaration, or of the Articles or Bylaws, including, without limitation, the recordation of any claim of lien with the Ada County Recorder, as more fully provided herein.
 - (d) Duty to Accept Property Transferred by Declarant. The Association shall accept title to any property, including without limitation, any improvements thereon, any easement or other right, and personal property transferred to the Association by the Declarant or by any third party with Declarant's permission, and equipment related thereto, together with the responsibility to perform any and all Association functions associated therewith, provided that such property and functions are not inconsistent with the terms of this Declaration. Without limiting the foregoing, it is contemplated that the Declarant shall transfer to

the Association by good and sufficient deed Residential Lot 64, Block 1, that portion of Lot 60, Block 1 that is contiguous to the Residential Lots, and the Drainage Lot, together with any Improvements thereon.

- (e) Safety and Security. Each Owner and occupant and Tenants of a Four Plex unit, and their respective guests and invitees, shall be responsible for their own personal safety and the security of their property in the Village. The Association may, but shall not be obligated to, maintain or support certain activities within the Property designed to enhance the level of safety or security which each person provides for himself and his property. Neither the Association nor Declarant shall in any way be considered insurers or guarantors of safety or security within the Property, nor shall either be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.

6.8 Personal Liability: No Member of the Board, or member of any committee of the Association, or any officer of the Association, or the Declarant, shall be personally liable to any Owner or Tenants, or to any other party, including the Association, for any damage, loss, or prejudice suffered or claimed on the account of any act, omission, error or negligence of the Association, other committee, or any officer of the Association, or the Grantor, provided that such person, upon the basis of such information as may be possessed by such person, has acted in good faith without willful or intentional misconduct.

ARTICLE VII ASSESSMENTS

7.1 Covenant to Pay Assessments: By acceptance of a deed to any Residential Lot in the Property each Owner of such Residential Lot hereby covenants and agrees to pay when due all Assessments or charges made by the Association, including all Regular, Special and Limited Assessments and charges made against such Owner pursuant to the provisions of this Declaration or other applicable instrument. IN ADDITION, as provided as Section 4.2, any Owner of a Residential Lot within Resolution Subdivision hereby covenants and agrees to pay when due the Owner's pro rata share of all assessments or charges made by the Resolution Business Park POA either against the Association or against such Owner pursuant to the Master Declaration.

- A. Assessment Constitutes Lien. Such Assessments and charges, together with interest at a rate established by the Board, costs and reasonable attorneys' fees which may be incurred in collecting the same, shall be a charge on the land and shall be a continuing lien upon the Residential Lot against which each such Assessment or charge is made.
- B. Assessment is Personal Obligation. Each such Assessment, together with interest at a rate established by the Board, costs and reasonable attorney's fees, shall also

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be the personal obligation of the Owner of such Residential Lot beginning with the time the Assessment falls due. The personal obligation for delinquent Assessments shall remain such Owner's personal obligation regardless of whether he remains an Owner.

7.2 Uniformity of Assessments: Regular Assessments, including the Association's expenses of Four Plex and Residential lot maintenance and repair, shall be uniform as to all Owners; except that, in the discretion of the Board, if maintenance or repair costs for any specific Residential Lot or Four Plex are materially in excess of the cost for similar repair or maintenance on the other Residential Lots and Four Plexes in the Property, the Board may assess such excess cost as a Limited Assessment against such Owner.

7.3 Regular Assessments: The regular assessments may include, and shall be limited to, the following regular expenses:

- A. The Association's repairs and maintenance of Residential Lots and Four Plexes expenses, as described at **Article III**;
- B. Any assessments made by the Nampa Meridian Irrigation District in connection with irrigation water, and operation and maintenance expenses relating to the irrigation of the Property, as generally described at **Section 4.1** above;
- C. Expenses of the management of the Association and its activities;
- D. Taxes and special assessments upon the Association's real and personal property;
- E. Premiums for all insurance which the Association is required or permitted to maintain;
- F. Common services to Owners as approved by the Board;
- G. Legal and accounting fees for the Association;
- H. Expenses related to the maintenance and operation of the Common Areas, including maintenance and operation of the Recreation Center Lot with its related facilities, maintenance of the portion of Lot 60, Block 1 that is contiguous to the Residential Lots; Sidewalk maintenance and repairs; and maintenance of the Drainage Facilities, including the Drainage Lot.
- I. Any deficit remaining from any previous assessment year; and
- J. The creation of reasonable contingency reserves for future repairs and maintenance or improvements, administration expenses, or legal expenses.

Regular assessments shall be paid monthly, or as otherwise determined by the Board, as provided in **Section 7.6**.

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7.4 Declarant's Obligations: Prior to the expiration of the Declarant Control Period, the Declarant shall (only for Association Assessments, not Resolution Business Park POA Assessments) be deemed to have met its obligation regarding assessments by the contribution of such funds and/or services to the Association as are necessary to permit the Association to perform its responsibilities and meet its financial needs. After the expiration of the Declarant Control Period, Declarant shall be subject to the Association's assessment on any Residential Lots owned by Declarant and located within the Property. The obligations to pay Resolution Business Park POA Assessments, including Declarant's obligation, is described at Section 4.2 above.

7.5 Maximum Regular Assessments:

- A. The Board may pro rate the assessment for any Owner in the year of purchase of such Residential Lot on the basis of the actual months of ownership of such Residential Lot by the Owner during such year.
- B. Effective 2004, and for each subsequent year thereafter during the Declarant Control Period, assessments shall be set by the Declarant, as necessary to meet the Association's financial needs and pursuant to the terms and restrictions of this Article.
- C. Effective upon the expiration of the Declarant Control Period, the annual regular assessment may be increased by the Board by a sum not to exceed twenty percent (20%) of the prior year's regular assessment. Any increase in the regular assessment which exceeds twenty percent (20%) of the prior year's regular assessment shall require the approval of sixty-seven percent (67%) of those members present at or represented by proper proxy at a meeting of the membership conducted pursuant to notice and at which a quorum is present. Notice of such meeting shall set forth the purpose therefore and shall be sent to all members not less than thirty (30) days nor more than sixty (60) days in advance of such meeting.

7.6 Regular Assessment Procedure:

- A. After the Declarant Control Period, the Board shall set the total annual regular assessment based upon an advanced budget of the Association's requirements for the following assessment year. A summary of that budget shall be mailed by ordinary first class mail or otherwise delivered to all Owners by no later than December 1 of the current budget year (i.e. to take effect on January 1 of the next assessment year). Subject to the voting requirements of any increase in the annual regular assessment which exceeds twenty percent (20%) of the prior year's regular assessment, the budget shall take effect on January 1 of the assessment year to which it applies.

- B. The Board shall cause to be prepared, delivered, or mailed to each Owner, at least thirty (30) days in advance of the date payment is due, a payment statement setting forth the annual regular assessment. All payments of regular assessments shall be due and payable without any notice or demand, on the due dates declared by the Board. Regular assessments are to be paid in monthly installments, or other appropriate interval, as determined by the Board. Regular assessments shall be applicable to all Residential Lots, provided that the Declarant's liability shall be as provided in Section 7.4 above. Each Owner other than the Declarant shall become responsible for the regular assessment on a Residential Lot as of the date the Residential Lot is transferred to such owner. The first annual regular assessment for each Owner shall be adjusted according to the number of months remaining in the year.

7.7 Special Assessments:

(a) In the event that the Board shall determine that its Regular Assessments for a given calendar year is or will be inadequate to meet the expenses of the Association for any reason, including, but not limited to capital improvements, attorneys' fees and/or litigation costs, other professional fees, or for any other reason, the Board shall determine the amount necessary to defray such expenses and levy a Special Assessment which shall be computed in the same manner as Regular Assessments. After the Declarant Control Period, no Special Assessment shall be levied without the vote or written consent of a majority of the votes of the members of the Association, which are present at a property scheduled meeting of the members or represented by proxy. The Board shall, in its discretion, determine the schedule under which such Special Assessment will be paid. Every Special Assessment levied by and for the Association shall be levied and paid upon the same basis as that prescribed for the levying and payment of Regular Assessments for the Association.

(b) There shall be an initial special assessment upon the closing of the first sale of each Lot from the Declarant. At such closing the purchaser thereof shall pay the sum of \$10,000 to the Association to fund the Association's purchase of the Recreational Center Lot.

7.8 Limited Assessments: Notwithstanding the above provisions with respect to regular and special assessments, the Board may levy a limited assessment against an Owner as a remedy to reimburse the Association for costs incurred in bringing the Owner and/or such Owner's Residential Lot into compliance with the provisions of the Association Documents.

7.9 Uniform Rate of Assessment: Unless otherwise specifically provided herein, regular and special assessments shall be fixed at a uniform rate per Residential Lot for all members of the Association.

7.10 Assessment Period. Unless otherwise provided in the Articles or Bylaws, the Assessment period shall commence on January 1 of each year and terminate December 31 of the year.

7.11 Notice of Default and Acceleration of Assessments: If any assessment is not paid within thirty (30) days after its due date, the Board may mail a notice of default to the Owner. The notice shall substantially set forth (a) the fact that the installment is delinquent; (b) the action required to cure the default; (c) a date not less than twenty (20) days from the date of the mailing of the notice by which the default must be cured; and (d) that the failure to cure the default on or before the date specified in the notice may result in the foreclosure of the lien for assessment against the Residential Lot of the Owner and the exercise by the Board of any other remedies either provided herein or allowed by law. In such case, and as a condition of the cure of the delinquent assessment, the Owner may be obligated by the Board, at the Board's sole discretion, to additionally pay all costs of enforcement, including without limitation reasonable attorneys' fees, costs and related expenses and to pay a reasonable late charge to be determined by the Board.

7.12 Enforcement of Assessments: Each Owner is and shall be deemed to covenant and agree to pay to the Association each and every assessment provided for in this Declaration; and agrees to the enforcement of all such assessments in the manner herein specified. In the event an attorney or attorneys are employed for collection of any assessment, whether by suit or otherwise, or to enforce compliance with or specific performance of the terms and conditions of this Declaration, each Owner agrees to pay reasonable attorneys fees and costs thereby incurred in addition to any other remedies herein or by law provided, the Board, or its authorized representative, may enforce the obligations of the Owners to pay the assessments provided for in this Declaration, and each of them, in any manner provided by law in equity, or without any limitation of the foregoing, by either or both of the following procedures:

- A. Enforcement by Suit. By commencement of a suit at law against any Owner or Owners personally obligated to pay assessments, for such delinquent assessments as to which they are personally obligated. Any judgment rendered in any such action shall include the amount of the delinquency, together with interest thereon as provided for herein, costs of collection, court costs and reasonable attorney's fees in such amount as the Court may adjudge against the delinquent Owner. Suit to recover a money judgment for unpaid assessments shall be maintainable without foreclosing or waiving the lien hereinafter provided for.
- B. Enforcement by Lien. There is hereby created a claim of lien, with power of sale, on each and every Residential Lot to secure payment to the Association of any and all assessments levied against any and all Owners, together with interest thereon as provided for in this Declaration, fines imposed for violation of these Covenants, and all costs of collection which may be paid or incurred by the Association in connection therewith, including reasonable attorneys' fees. The Board, or its duly authorized representative, may file and record a Notice of Delinquent Assessment on behalf of the Association against the Residential Lot of the defaulting Owner who has not cured the default, as provided in Section 7.11 above. The amount of the assessment, plus any costs of collection, expenses, attorneys' fees and interest assessed in accordance with this Declaration shall be a lien on the Owner's Residential Lot from and after the time the Association records the Notice of Delinquent Assessment. Such Notice shall be executed and

acknowledged by any officer of the Association and shall contain substantially the following:

1. The claim of lien made pursuant to this Declaration;
2. The name of the record Owner;
3. The legal description of the Residential Lot against which claim of lien is made;
4. The total amount claimed to be due and owing for the amount of the delinquency, interest thereon, collection costs, and attorneys' fees (with any proper offset allowed); and
5. The name and address of the trustee authorized by the Association to enforce the lien by public sale.

Upon recordation, the lien claimed therein shall immediately attach and become effective in favor of the Association as a lien upon the Residential Lot against which such assessment was levied. Such lien shall have priority over all liens or claims created subsequent to the recordation of the Notice. Any such lien may be foreclosed by appropriate action in Court or in the manner provided by the Idaho Code for the foreclosure of a deed of trust with power of sale, or in any other manner permitted by law. The Board is hereby authorized to appoint its attorney, any officer or director of the Association, or any Title Company authorized to do business in Idaho as Trustee for the purpose of conducting such power of sale foreclosure. The lien provided for herein shall be in favor of the Association and shall be for the benefit of all other Residential Lot Owners and payable in accordance with this Declaration after the date of recordation of said Notice. The Association shall have the power to bid in at any foreclosure sale and to purchase, acquire, hold, lease, mortgage and convey any Residential Lot.

Each Owner hereby expressly waives any objection to the enforcement and foreclosure of assessment liens in this manner. Upon the timely curing of any default for which a Notice was filed by the Board, the Board shall cause an officer of the Association to file and record an appropriate release of such Notice in the Office of the County Recorder of Ada County, Idaho. No Owner may waive or otherwise escape liability for the assessments provided for in this Declaration by non-use or abandonment of his Residential Lot.

ARTICLE VIII COMMON AREAS AND SIDEWALKS

8.1 Members' Easements of Enjoyment: Subject to the provisions of Section 10.4 herein, every Owner and their Tenants, including Declarant as to his unsold Residential Lots, shall have a right and easement of enjoyment in and to the Common Areas, and Sidewalks, and such easement shall be appurtenant to and pass with the title to every Residential Lot.

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8.2 Transfer of the Title of the Common Area to the Association: The Declarant hereby covenants for itself, its successors and assigns, that, no later than one (1) year following the recordation of this Declaration with the Office of Recorder of Ada County, or at the conclusion of the period of Declarant Control, whichever occurs later, it shall convey fee simple title to the Common Areas, ~~excepting, however, the Recreational Center Lot, which shall be~~ purchased by the Association, free and clear of any and all encumbrances and liens, except current real property taxes, which shall be prorated to the date of transfer, reservations, easements, covenants, conditions and restrictions then of record, including those set forth in this Declaration, to the Association, together with improvements thereon and appurtenances thereto.

8.3 Reservation of Limited Easements: The Declarant, on behalf of itself, its agents, employees, contractors, subcontractors, invitees, successors, assigns and other authorized personnel, and on behalf of the Association, reserves unto itself, in perpetuity, a non-exclusive easement in, over, upon and through the Property for driveway and parking purposes, for drainage and encroachment purposes, and for ingress to and egress from the Common Areas for the purpose of completing improvements thereon or for the performance of necessary repair and maintenance work, and for ingress and egress to Declarant's adjacent properties.

8.4 Owners' Easement of Enjoyment: Every Owner of a Residential Lot shall have an easement and equitable rights of use and enjoyment in and to and throughout the Common Areas as well as a non-exclusive easement and equitable right for ingress, egress and support over and through the Common Areas and Sidewalks. Each such easement and right shall be appurtenants to and pass with the title of every Residential Lot subject to the following restrictions:

- A. The right of the Association, in accordance with provisions of the Articles, Bylaws and this Declaration, to borrow money for the purpose of improving the Common Areas, and in aid thereof, to mortgage said properties; provided, however, that in the event of a default upon any such mortgage, the lender's rights hereunder shall be subordinate to the rights of the Members;
- B. The right of the Association to take such steps as are reasonably necessary to protect the above described properties against foreclosure;
- C. The right of the Association, in accordance with its Bylaws and the provisions of this Declaration to temporarily suspend an Owner's rights as a Member of the Association, following notice and hearing, for any period during which any assessment remains unpaid and for a reasonable period for any infraction of its published Rules and Regulations. Notwithstanding the foregoing, the Association shall have no right to interfere with an Owner's right of ingress to or egress from his Residential Lot;
- D. The right of the Association to charge reasonable admission, use and other fees, and to promulgate reasonable rules and regulations for the use of the Common Areas;

- E. The right of the Association to establish and amend rules with regard to the use, maintenance and repair of the Common Areas and Sidewalks;
- F. The right of the Declarant, and upon the expiration of the Declarant Control Period, the right of the Association, to designate guest parking areas in the Driveway and Parking Lot;
- G. The right of the Association to landscape the Residential Lots and the Recreation Center Lot.

8.5 No Dedication to the Public: Nothing in this Declaration or the other Subdivision Documents will be construed as a dedication to public use, or a grant to any public municipal or quasi-municipal authority or utility, or an assumption of responsibility for the maintenance of any Common Area by such authority or utility, absent an express written agreement to that effect.

8.6 Association's Responsibility for Common Area: The Association, subject to the rights and obligations of the Owners set forth in this Declaration, shall be responsible for the management and control of the Common Area, all landscaped areas, and Sidewalks, and all Improvements thereon (including furnishings and equipment related thereto), and will keep such properties in good, clean, and attractive condition and repair consistent with the standards of the Property.

8.7 Partition not Permitted: The Owner's undivided rights to use and enjoy the Common Area and Sidewalks, which is herein established and is appurtenant to the respective Residential Lots cannot be changed and shall not be separated or separately conveyed. Each undivided interest shall be deemed to be conveyed or encumbered with its respective Residential Lot, even though the description in the instrument of conveyance or encumbrance may refer only to the fee title to the Residential Lot.

ARTICLE IX RESERVED EASEMENTS

9.1 Utility Easements: There is hereby created a general easement upon, across, over, in, and under the Property for ingress and egress and for installation, replacement, repair, and maintenance of all utilities, including but not limited to water, sewer, gas, telephone, electrical, television and a master communications system. By the virtue of this easement, it will be expressly permissible and proper for the companies providing electrical, television, telephone and other communication services to install and maintain necessary equipment on the Property and to affix and maintain electrical, television, communications, and telephone wires, circuits, and conduits under the Property. Any utility company using this general easement shall use its best efforts to install and maintain the utilities provided for without disturbing the uses of the Owners or the Association; shall prosecute its installation and maintenance activities as promptly and expeditiously as reasonably possible; and shall restore the surface to its original condition as soon as possible after completion of its work. Should any utility company furnishing a service covered by the general easement request a specific easement by separate recordable document,

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either the Declarant or the Association shall have, and are hereby given the right and authority to grant such easement upon, across, over, or under any part or all of the Property without conflicting with the terms of this Declaration. This general easement will in no way affect, avoid, extinguish, or modify any other recorded easement on the Property.

9.2 Reservation of Easements, Exceptions, and Exclusions for Utilities, Infrastructure, and Access: Declarant reserves for itself and its successors and assigns and hereby grants to the Association, acting through the Board of Directors, the concurrent right to establish from time to time, by declaration or otherwise, utility and other easements, permits, or walkways, drainage, recreation areas and parking areas, and to create other reservations, exceptions, and exclusions in the interest of the Owners and the Association.

9.3 Maintenance Easement: An easement is hereby reserved to Declarant for itself and its successors and assigns and granted to the Association, and any member of the Board of Directors or Manager, and their respective officers, agents, employees and assigns, upon, across, over, in and under the Property and a right to make such use of the Property as may be necessary or appropriate to make emergency repairs or to perform the duties and functions which the Association is obligated or permitted to perform, including but not limited to the following: the right to enter upon any Residential Lot and the exterior of any Four Plex for the purpose of performing repairs and maintenance to such Residential Lot or Four Plex, as provided for herein; and the right to enter upon any Residential Lot to perform landscaping services, and to install, repair and maintain the PUIS.

9.4 Drainage Easement: An easement is hereby reserved to Declarant for itself and its successor and assigns and granted to the Association, its officers, agents, employees, successors and assigns to enter upon, across, over, in, and under any portion of the Property for the purpose of changing, correcting, or otherwise modifying the grade or drainage channels of the Property so as to improve the drainage water. Reasonable efforts will be made to use this easement so as not to disturb the uses of the Owners, or the Association, as applicable, to the extent possible; to prosecute such drainage work promptly and expeditiously; and to restore any areas affected by such work to a usable condition as soon as reasonably possible following such work. Declarant, or its officers, agents, employees, successors and assigns must inform and obtain the approval of the Board prior to undertaking such drainage work, which approval will not be unreasonably withheld.

9.5 Declarant Rights Incident to Construction: Declarant, for itself and its successors and assigns, hereby retains a right and easement of ingress and egress over, in, upon, under, and across the Common Areas and the right to store materials thereon and to make such Improvements on the Property or other real property owned by Declarant; provided, however, that no such rights will be exercised by Declarant in such a way as to unreasonably interfere with the occupancy, use, enjoyment or access to a Owner's Residential Lot by that Owner or his Tenants.

9.6 Easements Deemed Created: All conveyances of Residential Lots hereafter made, whether by Declarant or otherwise, will be construed to grant and reserve the easements

contained in this Article, even though no specific reference to such easements or to this Article appears in the instrument for such conveyance.

ARTICLE X INSURANCE AND FIDELITY BONDS

10.1 Authority to Purchase: All insurance policies relating to the Common Areas, Sidewalks, and Drainage Lot, will be purchased by the Board or its duly authorized agent. The Board will not be liable for failure to obtain any coverage required by this Article or for any loss or damage resulting from such failure if such failure is due to the unavailability of such coverage from reputable insurance companies, or if such coverage is unavailable only at demonstrably unreasonable costs. Notwithstanding the foregoing, if the insurance described below is not reasonably available, or if any policy of such insurance is cancelled or not renewed without a replacement policy having been obtained, the Association promptly will cause notice of that fact to be delivered to all Owners.

10.2 General Insurance Provisions: All such insurance coverage obtained by the Board will be governed by the following provisions:

- A. As long as Declarant owns any Residential Lot, Declarant will be protected by all such policies in the same manner as any other Owner. The coverage provided to Declarant under the insurance policies obtained in compliance with this Article will not be deemed to protect or be for or be for the benefit of any general contractor engaged by Declarant.
- B. The deductible, if any, on any insurance policy purchased by the Board may be treated as an expense payable from Regular Assessments or Special Assessments (allocable to all of the Residential Lots or to only some of the Residential Lots, if the claims for damages arise from the negligence of particular Owners, or if the repairs benefit only particular Owners), or as an item to be paid from working capital reserves established by the Board.

10.3 Physical Damage Insurance on Common Areas: This Association will obtain insurance for all insurable Improvements, if any, on the Common Areas and Drainage Facilities in an amount equal to the full replacement value (i.e. 100% of the current "replacement cost" inclusive of land, foundation, excavation, depreciation on personal property, and other items normally excluded from coverage), which will include all building service equipment and the like, common personal property and supplies, and any fixtures or equipment within the Common Areas. In addition, such policy will afford protection against at least the following:

- A. Loss or damage by fire and other hazards covered by the standard extended coverage endorsement with the standard "all-risk" endorsement covering sprinkler leakage, debris removal, cost of demolition, vandalism, malicious mischief, windstorm and water damage.

- B. Such other risks as will customarily be covered with respect to projects similar in construction, location, and use to this project.
- C. In contracting for the insurance coverage obtained pursuant to this Section, the Board will be required to make reasonable efforts to secure coverage which provides the following:
 - 1. A waiver of any right of the insurer to repair, rebuild or replace any damage or destruction, if a decision is made pursuant to this Declaration not to do so.
 - 2. The following endorsements (or equivalent): (a) "cost of demolition"; (b) "contingent liability from operation of building laws or codes"; (c) "increased cost of construction"; and (d) "agreed amount" or elimination of co-insurance clause.

10.4 Liability Insurance: The Association will obtain a comprehensive policy of public liability insurance and property damage insurance with such limits as the Board may from time to time determine, insuring each member of the Board, the Association, and the respective employees, agents, and all persons acting as agents against any liability to the public or the Owners and Tenants (and their guests, invitees, Tenants, agents, and employees) arising in connection with the Ownership, operation, maintenance, or use of the Common Areas and Sidewalks, and any other areas under the control of the Association. Declarant will be included in the coverage as an additional insured in Declarant's capacity as an Owner or Director. The Owners will be included as additional insureds, but only for claims and liabilities arising in connection with the Ownership, existence, use or management of the Common Areas and Sidewalks.

The Board will review the coverage limits at least once every two years, but, generally, the Board will carry such amounts of insurance usually required by private institutional mortgage lenders on projects similar to the Association's Property.

10.5 Provisions Common to Physical Damage Insurance, Liability Insurance and Fidelity Insurance: Any insurance coverage obtained by the Association under the provisions of this Article above will be subject to the following provisions and limitations:

- A. The named insured under any such policies will include Declarant, until all Residential Lots have been conveyed, and the Association as attorney-in-fact for the Owners, or the authorized representative of the Association, who will have exclusive authority to negotiate losses under such policies.
- B. Each Owner will be an insured person with respect to liability arising out of the Owner's interest in the Common Areas and Sidewalks or membership in the Association.

- C. In no event will the insurance coverage obtained and maintained pursuant to this Article be brought into contribution with insurance purchased by the Owners or their Mortgagees.
- D. ~~The policies will provide that coverage will not be prejudiced by (i) any act or neglect or any Owner or Tenant (and their family, tenants, servants, agents, invitees and guests) when such act or neglect is not within the control of the Association, or (ii) any act or neglect or failure of the Association to comply with any warranty or condition with regard to any portion of the Property over which the Association has no control.~~
- E. The policies will contain a waiver by the insurer of any right to claim by way of subrogation against Declarant, the Board or the Association.
- F. The policies described above will provide that any "no other insurance" clause will expressly exclude individual Owners' policies from its operation so that the physical damage policy or policies purchased by the Board will be deemed primary coverage, and any individual Owners' policies will be deemed excess coverage.

10.6 Personal Liability Insurance of Officers and Directors: To the extent obtainable at reasonable cost, appropriate officers' and directors' personal liability insurance will be obtained by the Association to protect the officers and directors from personal liability in relation to their duties and responsibilities in acting as such officers and directors on behalf of the Association.

10.7 Owners' Responsibility: Insurance coverage for each Owner's Residential Lot and Four Plex, and all improvements and personal property located thereon, and casualty and public liability insurance coverage regarding the activities of the Owner, and the Owner's agents, invitees, or guests, with respect to their Residential Lot and Four Plex and with respect to the Common Area, shall be the responsibility of each respective Owner.

ARTICLE XI DAMAGE OR DESTRUCTION

11.1 Damage of Destruction of Common Areas:

- A. Estimate of Damages or Destruction. As soon as practical after an event causing damage to or destruction of any part of the Common Areas, unless such damage or destruction is minor, the Association will obtain an estimate or estimates that it deems reliable and complete of the costs of repair and reconstruction of that part of the Common Areas so damaged or destroyed. "Repair and reconstruction" as used in this Article will mean restoring the damaged or destroyed Improvements to substantially the same condition in which they existed prior to the damage or destruction.

- C. In no event will the insurance coverage obtained and maintained pursuant to this Article be brought into contribution with insurance purchased by the Owners or their Mortgagees.
- D. The policies will provide that coverage will not be prejudiced by (i) any act or neglect or any Owner or Tenant (and their family, tenants, servants, agents, invitees and guests) when such act or neglect is not within the control of the Association, or (ii) any act or neglect or failure of the Association to comply with any warranty or condition with regard to any portion of the Property over which the Association has no control.
- E. The policies will contain a waiver by the insurer of any right to claim by way of subrogation against Declarant, the Board or the Association.
- F. The policies described above will provide that any "no other insurance" clause will expressly exclude individual Owners' policies from its operation so that the physical damage policy or policies purchased by the Board will be deemed primary coverage, and any individual Owners' policies will be deemed excess coverage.

10.6 Personal Liability Insurance of Officers and Directors: To the extent obtainable at reasonable cost, appropriate officers' and directors' personal liability insurance will be obtained by the Association to protect the officers and directors from personal liability in relation to their duties and responsibilities in acting as such officers and directors on behalf of the Association.

10.7 Owners' Responsibility: Insurance coverage for each Owner's Residential Lot and Four Plex, and all improvements and personal property located thereon, and casualty and public liability insurance coverage regarding the activities of the Owner, and the Owner's agents, invitees, or guests, with respect to their Residential Lot and Four Plex and with respect to the Common Area, shall be the responsibility of each respective Owner.

ARTICLE XI DAMAGE OR DESTRUCTION

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- A. Estimate of Damages or Destruction. As soon as practical after an event causing damage to or destruction of any part of the Common Areas, unless such damage or destruction is minor, the Association will obtain an estimate or estimates that it deems reliable and complete of the costs of repair and reconstruction of that part of the Common Areas so damaged or destroyed. "Repair and reconstruction" as used in this Article will mean restoring the damaged or destroyed Improvements to substantially the same condition in which they existed prior to the damage or destruction.

- B. Repair and Reconstruction. As soon as practical after obtaining estimates, the Association will diligently pursue to completion the repair and reconstruction of the damaged or destroyed Improvements. The Association may take any and all necessary or appropriate action to effect repair and reconstruction, and no consent or other action by any Owner will be necessary. Assessments of the Association will not be abated during the period of insurance adjustments and repair and reconstruction.
- C. Funds for Repair and Reconstruction: The proceeds received by the Association from any hazard insurance will be used for the purpose of repair, replacement and reconstruction. If the proceeds of the insurance are insufficient to pay the estimated or actual cost of such repair and reconstruction, the Association may levy, assess and collect in advance from all Owners, a Special Assessment sufficient to provide funds to pay such estimated or actual costs of repair and reconstruction. Further levies may be made in like manner if the amounts collected prove insufficient to complete the repair and reconstruction.
- D. Disbursement of Funds for Repair and Reconstruction: The insurance proceeds held by the Association and the amounts received from Special Assessments constitute a fund for the payment of the costs of repair and reconstruction after casualty. It will be deemed that the first money disbursed in payment for the costs of repair and reconstruction will be made from insurance proceeds, and the balance from the Special Assessments. If there is a balance remaining after payment of all costs of such repair and reconstruction, such balance will be distributed to the Owners in proportion to the contributions each Owner made as a Special Assessment to the Association.
- E. Decision not to Rebuild: If, the Owners representing at least 67% of the votes in the Association agree in writing not to repair and reconstruct damage to the Common Areas and no alternative Improvements are authorized, then and in that event the Property will be restored to its natural state and maintained as an undeveloped portion of the Common Areas by the Association in a neat and attractive condition, and any remaining insurance proceeds will be distributed equally to the Owners.
- 11.2 Damage or Destruction to Four Plex or Residential Lot/Obligation to Repair and Restore:
- A. In the event a Four Plex shall be partially or entirely destroyed by fire or other casualty such Four Plex shall either be repaired and restored within a reasonable period of time in a manner consistent with the applicable Design Guidelines or demolished and the Residential Lot landscaped in accordance with the applicable Design Guidelines so that no damaged portion of the former structure remains visible from any other Residential Lot or Common Area. Subject only to the rights of an institutional holder of a first mortgage lien on a damaged Four Plex the insurance proceeds from any insurance policy covering a damaged or

destroyed Four Plex shall be first applied to such repair, restoration or replacement of such Four Plex or the demolition of such Four Plex and landscaping of such Residential Lot. Each Owner shall be responsible for the repair, restoration, replacement or demolition of repair, restoration or replacement, or demolition of each Four Plex owned by such Owner, pursuant to the terms of this Declaration. Any such repair, restoration or replacement shall (subject to advances and changes in construction techniques and materials generally used in such construction and then current generally accepted design criteria) be consistent with the portion of the Four Plex repaired, unless the Board approves other plans for the repair and reconstruction of the damaged Four Plex.

- B. If the proceeds of the insurance available to the Owner of a damaged Four Plex are insufficient to pay for the cost of repair, restoration or replacement of a Four Plex following a casualty (or demolition and landscaping if the Four Plex is to be demolished), the Owner of such Four Plex shall be responsible for the payment of any such deficiency necessary to complete the repair, restoration, replacement or demolition, as required by this Article.
- C. If the insurance proceeds in excess of the amount necessary for the repair, restoration, or replacement of a Four Plex, the Owner of such Four Plex shall be entitled to such excess in accordance with the provisions of the applicable insurance policy or policies and subject to the terms of any mortgage covering such Four Plex.

ARTICLE XII MISCELLANEOUS

12.1 Term: The easements created hereunder shall be perpetual, subject only to extinguishment by the holders of such easements as provided by law. The covenants, conditions, restrictions, and equitable servitudes of this Declaration shall run until August 1, 2044, unless amended as herein provided. After August 1, 2044, such covenants, conditions and restrictions shall be automatically extended for successive periods of ten (10) years each, unless amended or extinguished by a written instrument executed by Owners holding at least seventy-five percent (75%) of the voting power of the Association and such written instrument is recorded with the Ada County Recorder.

12.2 Amendment:

- A. By Owners. Except where a greater percentage is required by express provision in this Declaration, any amendment to the provisions of this Declaration, other than this Article XIV, shall be by an instrument in writing signed and acknowledged by the president and secretary of the Association certifying and attesting that such amendment has been approved by the vote or written consent of the Owners representing more than seventy-five percent (75%) of the votes in the Association, and such amendment shall be effective upon its recordation with the Ada County Recorder. Any amendment to this Article XIV shall require the

vote or written consent of Members holding ninety-five percent (95%) of the voting power of the Association.

- B. Declarant's Approval. Notwithstanding the provisions of Section 14.2(A), no termination, extension, modification or amendment of this Declaration will be effective during the Period of Declarant Control unless the written approval of Declarant is first obtained.
- C. Validity and Effective Date of Amendments. Amendments to this Declaration shall become effective upon recordation in the land records of Ada County, Idaho, unless a later effective date is specified therein. Any procedural challenge to an amendment must be made within six months of its recordation or such amendment shall be presumed to have been validly adopted. In no event shall a change of conditions or circumstances operate to amend any provisions of this Declaration.

If an Owner consents to any amendment to this Declaration or the Bylaws, it will be conclusively presumed that such Owner has the authority to consent, and no contrary provision in any Mortgage or contract between the Owner and a third party will affect the validity of such amendment. No amendment shall be contrary to the terms or conditions of any valid County, State, or Federal Permit applicable to the Property; nor shall any Amendment divest any Owner of any material and substantial vested property rights.

No amendment may remove, revoke, or modify any right or privilege of the Declarant without the written consent of the Declarant or the assignee of such right or privilege.

12.3 Mortgage Protection. Notwithstanding any other provision of this Declaration, no amendment of this Declaration shall operate to defeat or render invalid the rights of any mortgagee under a mortgage or the beneficiary under any deed of trust upon a Residential Lot made in good faith and for value, and recorded prior to the recordation of such amendment, provided that after foreclosure of any such mortgage or deed of trust such Residential Lot shall remain subject to this Declaration, as amended.

12.4 Notices: Any notices permitted or required to be delivered as provided herein shall be in writing and may be delivered either personally or by mail. If delivery is made by mail, it shall be deemed to have been delivered seventy-two (72) hours after the same has been deposited in the United States mail, postage prepaid, addressed to any person at the address given by such person to the Association for the purpose of service of such notice, or to the residence of such person if no address has been given to the Association. Such address may be changed from time to time by notice in writing to the Association.

12.5 Enforcement and Non-Waiver:

- A. Right of Enforcement. Except as otherwise provided herein, any Owner of any Residential Lot shall have the right to enforce any or all of the provisions hereof against any Residential Lot within the Property and Owners thereof.

**DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF THE MULTI FAMILY
PORTION OF SAGECREST SUBDIVISION - 28**

S:\ronn\doc\Hunemiller\Resolution Subdivision\Sagecrest CC&Rs.111704.doc

- B. Violations and Nuisances. The failure of any Owner of a Residential Lot to comply with any provision hereof, or with any provision of the Articles or Bylaws of the Association, is hereby declared a nuisance and will give rise to a cause of action in the Declarant, the Association or any Owner of Residential Lot(s) within the Property for recovery of damages or for negative or affirmative injunctive relief or both.
- C. Violation of Law. Any violation of any state, municipal or local law, ordinance or regulation pertaining to the Ownership, occupation or use of any property within the Property is hereby declared to be in violation of this Declaration and subject to any or all of the enforcement procedures set forth in this Declaration and any or all enforcement procedures in law and equity.
- D. Remedies Cumulative. Each remedy provided herein is cumulative and not exclusive.
- E. Non-Waiver. The failure to enforce any of the provisions herein at any time shall not constitute a waiver of the right to enforce any such provision.


12.6 Interpretation: The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the development and operation of the Property. This Declaration shall be construed and governed under the laws of the State of Idaho.

- A. Restrictions Construed Together. All of the provisions hereof shall be liberally construed together to promote and effectuate the fundamental concepts of the development of the Property as set forth in the recitals of this Declaration.
- B. Restrictions Severable. Notwithstanding the provisions of the foregoing paragraph 12.6(A), each of the provisions of this Declaration shall be deemed independent and severable, and the invalidity or partial invalidity of any provision or portion thereof shall not affect the validity or enforceability of any other provision herein.
- C. Singular includes Plural. Unless the context requires a contrary construction, the singular shall include the plural and the plural the singular; and the masculine, feminine or neuter shall each include the masculine, feminine and neuter.
- D. Captions: All captions and titles used in this Declaration are intended solely for convenience of reference and shall not affect that which is set forth in any of the provisions hereof.

12.7 Successors and Assigns: All references herein to Declarant, Owners, and Association, or person, shall be construed to include all successors, assigns, partners, and authorized agents of such Declarant, Owners, Association or person.

IN WITNESS WHEREOFF, the parties have hereunto set their hands and seals this
____ day of _____, 2004

SAGECREST DEVELOPMENT, L.L.C.

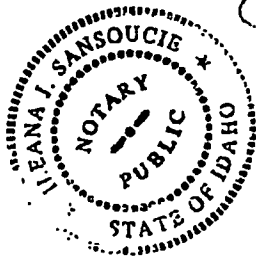
By 
Russell D. Hunemiller, its Member

STATE OF IDAHO,)
: ss.
County of Ada.)

On this 18 day of November, 2003, before me, the undersigned, a Notary Public in and for said State, personally appeared RUSSELL D. HUNEMILLER, known and identified to me to be the Member of SAGECREST DEVELOPMENT, L.L.C. an Idaho Limited Liability Company, that executed the instrument or the person who executed the instrument on behalf of said corporation, and acknowledged to me that such company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL)





Ileana Sansoucic
Notary Public for Idaho
Residing at Boise, Idaho
Commission expires: 11/19/2008

EXHIBIT A

LEGAL DESCRIPTION

Lots 10 through 32; Lots 45 through 53 and Lots 60 through 77 in Block 1 of SAGECREST SUBDIVISION, according to the official plat thereof, filed in Book 90 of Plats at Page(s) 10438 through 10441, official records of Ada County, Idaho.

STATE OF IDAHO, COUNTY OF ADA, ss.

I, J. David Navarro, Recorder for Ada County, do hereby certify that the Attached is a full, true and correct copy of Inst. No. 104146558 as it appears on record in Book 90 of Plats at Page 10438 of the Official Records of Ada County, State of Idaho.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal this 21 day of June, 2007.

J. DAVID NAVARRO, Recorder

Deputy

Section 6.6 A

Management Agent. The Board of Directors will contract or employ for the Association a management agent ("Manager") at a compensation established by the Board of Directors and Manager to perform such duties and services as the Board of Directors shall authorize, including, but not limited to the duties listed in Section 3.3 and enforcement of section 5 hereof. This management company for now will be H & H Properties L.L.C. with offices located at 520 S. Orchard Suite 101 Boise, Id 83705. This said management company will manage this association as well as all rental units within Sagecrest Property Owners Association, but at any time could be removed from this management with a 75% vote from the current members and also with a sixty (60) day written notice from these same members to this said management company notifying them of this decision. Grandfathered into this agreement as of this recording date is allowing owners that are currently managing their own properties will be allowed to continue the management until the property is sold at which time the new owner of the property would contract with the associations assigned manager. All owners that currently employ another management company would be required to change to the association's manager at the completion of the contract. The Board of Directors reserves the right to buy out the other manager's contract if they feel it is in the best interest of this association.

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Matthew G. Gunn, ISB No. 8763
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Attorneys for Defendants Jon Kalsbeek,
Jay Arla, Christopher Schwab and David Meisner

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

AFFIDAVIT OF JAY ARLA

NO. _____
A.M. _____ FILED P.M. 134

OCT 17 2014

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

STATE OF TEXAS)
) ss.
COUNTY OF BEXAR)

Jay Arla, being first duly sworn upon oath, deposes and states as follows:

1. Your Affiant is 18 years of age and makes this affidavit based upon his own personal knowledge.

2. I discharged my duties as Vice-President of the Sagecrest Property Owner's Association in good faith.

3. I exercised the care of an ordinarily prudent person in a like position under similar circumstances.

4. I acted in the best interests of Sagecrest and its members.

5. I relied on information and reports provided by professionals based upon my reasonable belief that the information and reports were within the providing person's professional competence.

6. At no point in time did I undertake any action, or decline to take any action, with the intent to inflict emotional harm on any of the Plaintiffs.

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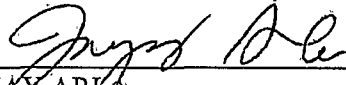
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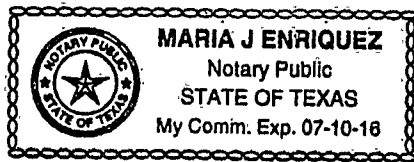
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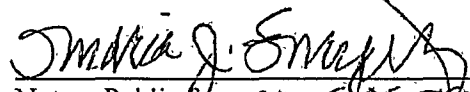
FURTHER YOUR AFFIANT SAITH NAUGHT.

Dated this 16 day of October, 2014.

By 
JAY ARLA

SUBSCRIBED AND SWORN to before me this 16 day of October, 2014.




Notary Public for STATE OF TEXAS
Residing at: 7333 WURZBACH, SA, TX 78229
Commission expires: 07-10-2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2014, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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Matthew Walters
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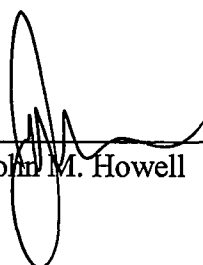
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

**AFFIDAVIT OF CHRISTOPHER
SCHWAB**

NO. _____
A.M. _____ FILED P.M. 134

OCT 17 2014

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

STATE OF CALIFORNIA)
) ss.
COUNTY OF SANTA CLARA)

Christopher Schwab, being first duly sworn upon oath, deposes and states as follows:

1. Your Affiant is 18 years of age and makes this affidavit based upon his own personal knowledge.
2. I discharged my duties as Secretary of the Sagecrest Property Owner's Association in good faith.
3. I exercised the care of an ordinarily prudent person in a like position under similar circumstances.
4. I acted in the best interests of Sagecrest and its members.
5. I relied on information and reports provided by professionals based upon my reasonable belief that the information and reports were within the providing person's professional competence.
6. At no point in time did I undertake any action, or decline to take any action, with the intent to inflict emotional harm on any of the Plaintiffs.

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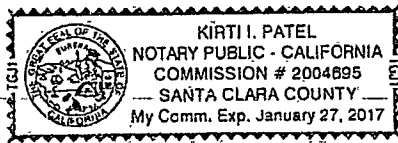
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FURTHER YOUR AFFIANT SAITH NAUGHT.

Dated this 15 day of October, 2014.

By Christopher Schwab
CHRISTOPHER SCHWAB

SUBSCRIBED AND SWORN to before me this 15 day of October, 2014.



[Signature]
Notary Public for CALIFORNIA
Residing at SANTA CLARA.
Commission expires: 01/27/2017

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2014, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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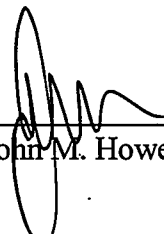
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Attorneys for Defendants Jon Kalsbeek,
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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
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TRAVIS FORBUSH and GRETCHEN
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(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

AFFIDAVIT OF DAVID MEISNER

NO. _____ FILED _____ 3A
A.M. _____ P.M. _____

OCT 17 2014

CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

David Meisner, being first duly sworn upon oath, deposes and states as follows:

1. Your Affiant is 18 years of age and makes this affidavit based upon his own personal knowledge.

2. I discharged my duties as Treasurer of the Sagecrest Property Owner's Association in good faith.

3. I exercised the care of an ordinarily prudent person in a like position under similar circumstances.

4. I acted in the best interests of Sagecrest and its members.

5. I relied on information and reports provided by professionals based upon my reasonable belief that the information and reports were within the providing person's professional competence.

6. At no point in time did I undertake any action, or decline to take any action, with the intent to inflict emotional harm on any of the Plaintiffs.

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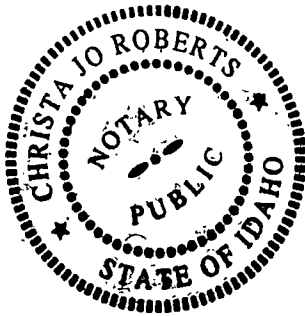
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FURTHER YOUR AFFIANT SAITH NAUGHT.

Dated this 15th day of October, 2014.

By 
DAVID MEISNER

SUBSCRIBED AND SWORN to before me this 15th day of October, 2014.



Christa Jo Roberts
Notary Public for Idaho
Residing at Nampa, ID
Commission expires: 10/09/2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2014, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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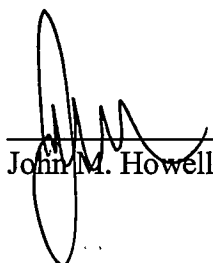
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John M. Howell

Copsey Beth
12/29/2014

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Attorneys for Defendants Jon Kalsbeek,
Jay Arla, Christopher Schwab and David Meisner

ORIGINAL

NO. _____
FILED _____
A.M. _____ P.M. _____
134
OCT 17 2014
CHRISTOPHER D. RICH, Clerk
By STACEY LAFFERTY
DEPUTY

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

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TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
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HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

**MEMORANDUM IN SUPPORT OF
DEFENDANTS KALSBECK, ARLA,
SCHWAB AND MEISNER'S MOTION
FOR SUMMARY JUDGMENT**

COME NOW the above-captioned Defendants, Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner, by and through their counsel of record, John M. Howell of the firm Brassey, Crawford & Howell, PLLC, and hereby submit this memorandum in support of their Motion for Summary Judgment.

I. INTRODUCTION

Plaintiffs assert three claims against Defendants Jon Kalsbeek, Jay Arla, Chris Schwab, and David Meisner (collectively hereinafter, the “POA Officers”): (1) negligence; (2) negligent infliction of emotional distress (“NIED”) (Plaintiff Halowell only); and (3) intentional infliction of emotional harm (“IIED”).

Summary judgment in favor of the POA Officers with regards to Plaintiffs’ negligence claims is appropriate because the Plaintiffs have failed to allege an individual duty owed to the Plaintiffs by any of the POA Officers, and in any event the POA Officers were acting in good faith in their official capacities as officers of a non-profit corporation at all relevant times, rendering their conduct immune from liability under Idaho law. Summary judgment in favor of the POA Officers with regards to Plaintiffs’ IIED claim is appropriate because Plaintiffs fail to allege that the POA Officers engaged in extreme or outrageous conduct and the POA Officers lacked the requisite intent to inflict emotional harm.

II. FACTUAL AND PROCEDURAL HISTORY

The Court has been presented with numerous motions and the record is voluminous. Accordingly, the Court is well aware of the underlying facts and circumstances of this case. These Defendants set forth the following in an effort to address the allegations and claims made against the POA Officers as set forth in the Fourth Amended Complaint.¹

McQuen Forbush died of carbon monoxide poisoning on November 10, 2012 while staying at an apartment located in the Sagecrest Apartment Complex (“Sagecrest”) in Meridian, Idaho. (*Fourth Am. Compl* (“FAC”), ¶ 1.) Mr. Forbush died in apartment #4624 (the “Apartment”), an

¹On September 19, 2014, the Court entered an Order granting Plaintiffs leave to file their Fourth Amended Complaint. To date, the Fourth Amended Complaint has not been filed.

apartment in a Sagecrest building owned by the Matthew E. Switzer Trust. (*FAC*, ¶ 29.) Mr. Forbush and his girlfriend, Breanna Halowell, were guests of the Apartment's tenant, Adra Kipper. (*FAC*, ¶ 30.)

At all relevant times, the Sagecrest Property Owner's Association ("POA") was an Idaho non-profit corporation. (*FAC*, ¶ 4.) At all relevant times, Defendant Jon Kalsbeek was acting as the President of the POA. (*FAC*, ¶ 5.) At all relevant times, Defendant Jay Arla was acting as the Vice-President of the POA. (*FAC*, ¶ 6.) At all relevant times, Defendant Chris Schwab was acting as the Secretary of the POA. (*FAC*, ¶ 7.) At all relevant times, Defendant David Meisner was acting as the Treasurer of the POA. (*FAC*, ¶ 8.)

Each owner of a Sagecrest apartment or building is a member of the POA. (*Affidavit of Jon Kalsbeek dated October 17, 2014* ("Kalsbeek Aff."), Ex. A, Sec. 6.2) The POA is responsible for maintaining certain areas of Sagecrest, including the exteriors of the residential units, exterior stairs and entryways, exterior railings and decks, street lamps, sidewalks, landscaping, drainage facilities, fencing, irrigation systems, and the common areas (which includes the parking lots, recreational center, and drainage lot). (*Id.*, Sec. 3.3) At all relevant times, the POA and the Matthew E. Switzer Trust contracted with Defendant First Rate Property Management ("First Rate") to act as the property manager for Sagecrest. (*FAC*, ¶¶ 9, 28, 31.)

Owners of Sagecrest apartments or buildings have an express, exclusive responsibility to maintain the interiors of residential units they own. (*Id.*, Sec. 3.3(B) & 3.5) An owner's duty regarding the interior of his or her units includes the flooring, ceilings, walls, wall coverings, appliances, plumbing and plumbing fixtures, electrical system and fixtures, and all interior components of the heating and air conditioning system. (*Id.*) Sagecrest owners also have a duty to maintain certain exterior portions of their residential units, including the outside of windows and

doors, exterior air conditioning units, and all other exterior maintenance not performed by the POA. (*Id.*) The POA has no independent power or authority to perform any service, repairs, or maintenance, on the interiors of the residential units. (*Id.*)

In 2011, in response to concerns regarding carbon monoxide in some Sagecrest buildings, Sagecrest hired Engineering Consultants, Inc. (“ECI”) to investigate and evaluate the concerns. (*Kalsbeek Aff.*, ¶ 3.)

On March 9, 2012 First Rate conducted carbon monoxide testing in Sagecrest apartments, including the Apartment, and obtained some high readings. (*Affidavit of Tony Drost dated July 24, 2014* (“Drost Aff.”), ¶ 51.) Mr. Kalsbeek was a member of the entity that owned one of the Sagecrest apartments, apartment number 3724, with a high carbon monoxide reading. (*Kalsbeek Aff.*, ¶ 4.) At First Rate’s request, Express Plumbing re-tested the specific unit and Express Plumbing obtained no high or abnormal carbon monoxide readings. (*Kalsbeek Aff.*, ¶ 5.)

On March 12, 2012 Intermountain Gas Company (“IGC”) re-tested the Apartment for carbon monoxide and registered a reading of 19 parts per million of carbon monoxide in the draft hood of the Apartment’s water heater, and a reading of zero parts per million of carbon monoxide outside the draft hood. (*FAC*, ¶ 50; *Drost Aff.*, ¶ 55.) IGC informed First Rate that any water heater that registered a carbon monoxide reading in excess of 50 parts per million would be “red tagged” and no gas would be delivered until the red tagged water heater was cleaned or replaced. (*Id.*) IGC tested other apartments at Sagecrest and found no high carbon monoxide readings. (*Id.*, ¶56.)

Mr. Kalsbeek was confused by the discrepancy between First Rate’s high carbon monoxide reading in unit 3724 on March 9 and the normal carbon monoxide readings obtained by Express Plumbing. (*Kalsbeek Aff.*, ¶ 6.) Mr. Kalsbeek was unaware that First Rate Property Management had no written carbon monoxide testing procedures. (*Id.*) Accordingly, on March 19, 2012 Mr.

Kalsbeek met with IGC to discuss carbon monoxide testing procedures. (*Kalsbeek Aff.*, ¶ 7.) IGC provided Mr. Kalsbeek with instructional materials regarding procedures for proper carbon monoxide testing. (*Id.*) Mr. Kalsbeek also obtained information regarding carbon monoxide testing procedures from several internet-based sources, including the Department of Energy. (*Id.*)

On March 20, 2012 Mr. Kalsbeek met with First Rate employees to discuss carbon monoxide testing procedures at Sagecrest, and Mr. Kalsbeek provided First Rate with the materials that he had gathered regarding carbon monoxide testing. (*Kalsbeek Aff.*, ¶ 8.) Following the meeting Mr. Kalsbeek exchanged several emails with First Rate employees and the POA Officers with respect to the development of written carbon monoxide testing procedures. (*Kalsbeek Aff.*, ¶ 9.) Written carbon monoxide testing procedures were eventually developed which were utilized by First Rate in testing for carbon monoxide at Sagecrest. (*Id.*)

The POA Officers each discharged their respective duties as an officer of the POA in good faith. (*Kalsbeek Aff.*, ¶ 10; *Arla Aff.*, ¶ 2; *Schwab Aff.*, ¶ 2; *Meisner Aff.*, ¶ 2.) The POA Officers each exercised the care of an ordinarily prudent person in a like position under similar circumstances. (*Kalsbeek Aff.*, ¶ 11; *Arla Aff.*, ¶ 3; *Schwab Aff.*, ¶ 3; *Meisner Aff.*, ¶ 3.) The POA Officers each believed the he acted in the best interests of Sagecrest and its members. (*Kalsbeek Aff.*, ¶ 12; *Arla Aff.*, ¶ 4; *Schwab Aff.*, ¶ 4; *Meisner Aff.*, ¶ 4.) The POA Officers relied on information and reports provided by professionals based upon his reasonable belief that the information and reports were within the providing person's professional competence. (*Kalsbeek Aff.*, ¶ 13; *Arla Aff.*, ¶ 5; *Schwab Aff.*, ¶ 5; *Meisner Aff.*, ¶ 5.) At no point in time did The POA Officers undertake any action, or decline to take any action, with the intent to inflict emotional harm on any of the Plaintiffs. (*Kalsbeek Aff.*, ¶ 14; *Arla Aff.*, ¶ 6; *Schwab Aff.*, ¶ 6; *Meisner Aff.*, ¶ 6.)

Consistent with the POA Officers' minimal active involvement in the events giving rise to this matter, the FAC, in its 190 paragraphs, makes only four factual allegations regarding the individual POA Officers:

On information and belief, First Rate informed the president and officers of the Sagecrest POA and building owner the trustee of the Matthew E. Switzer, Trust of the dangerous conditions caused by the defective water heaters well before November 10, 2012. However, despite this knowledge, none of these defendants took the appropriate action to rectify or alleviate the deadly situation that existed in Building 46 and throughout the Sagecrest complex. *FAC*, ¶ 33.

Following PFC Forbush's death, the Sagecrest POA, and each of its officers named herein sent a letter to First Rate prohibiting First Rate from warning other tenants of the dangers at the complex. 'I am instructing you to make no comments and to have no discussion with anyone, whether media representatives, tenants, owners, or anyone concerning the recent events at Sagecrest involving the death of a young man as the alleged result of CO poisoning.' *FAC*, ¶ 42.

In September 2011, the Sagecrest Board of Directors approved a contract with Engineering Consultants Incorporated "ECI," a local engineering firm, to conduct a 'Water Heater Site Investigation' at Sagecrest. ECI confirmed the problem was with the 'flame arrestor' or intake vent clogging on A.O. Smith water heaters and reported its findings to the Sagecrest Board of Directors and First Rate. *FAC*, ¶ 49.

Defendant Kalsbeek interceded after the March 2012 meeting with Intermountain Gas and directed First Rate personnel to disregard the testing procedures as instructed by Intermountain Gas. Kalsbeek directed First Rate not to test the water heater flu, but to test in the apartment. *FAC*, ¶ 53.

Ms. Halowell and Mr. Forbush's parents, Gretchen Hymas and Travis Forbush, filed suit on March 7, 2013. *See, Complaint*. Plaintiffs amended their complaint the next day. *See, Amended Complaint*. Plaintiffs, with leave of the Court, filed their second amended complaint on August 2, 2013. *See, Second Amended Complaint*. Plaintiffs, with leave of the Court, filed their third amended complaint on April 11, 2014. *See, Third Amended Complaint*. Plaintiffs moved for leave to file a

fourth amended complaint ("FAC"). *See, Plaintiffs' Third Motion to Amend Complaint.* The majority of the proposed amendment was denied at oral argument on July 3, 2014, but Plaintiff Halowell was permitted to add a claim for negligent infliction of emotional distress. Plaintiffs have been granted leave to file their FAC, but have not done so.

III. GOVERNING LAW

Summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c). For purposes of summary judgment, the evidence is construed liberally and all reasonable inferences are drawn in favor of the nonmoving party. *O'Guin v. Bingham County*, 139 Idaho 9, 13 (2003).

The party moving for summary judgment initially carries the burden of establishing that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence has been established, the burden then shifts to the nonmoving party to show, via further depositions, discovery responses, or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994). The nonmoving party cannot rest upon mere speculation and must submit more than just

conclusory assertions that an issue of material fact exists to withstand summary judgment. *Cantwell v. City of Boise*, 146 Idaho 127, 133, 191 P.3d 205, 211 (2008). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact. *Finholt v. Cresto*, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007). Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to the party's case. *Cantwell*, 146 Idaho at 133, 191 P.3d at 211.

IV. DISCUSSION

The FAC asserts three claims against the POA Officers: (1) negligence; (2) NIED; and (3) IIED. Summary judgment in favor of the POA Officers with regards to Plaintiffs' negligence claims is appropriate because the Plaintiffs have failed to allege an individual duty owed to the Plaintiffs by any of the POA Officers, and in any event the POA Officers were acting in good faith in their official capacities as officers of a non-profit corporation at all relevant times, rendering their conduct immune from liability under Idaho law. Summary judgment in favor of the POA Officers with regards to Plaintiffs' IIED claim is appropriate because Plaintiffs fail to allege that the POA Officers engaged in extreme or outrageous conduct and the POA Officers lacked the requisite intent to inflict emotional harm.

A. *Summary Judgment in Favor of the POA Officers with Regards to Plaintiffs' Negligence Claims is Appropriate Because the Plaintiffs have Failed to Allege any Individual Duty Owed to the Plaintiffs by any of the POA Officers, and in any Event the POA Officers were Acting in Good Faith in Their Official Capacities as Officers of a Non-Profit Corporation at all Relevant Times, Rendering their Conduct Immune From Liability Under Idaho Law.*

Summary judgment in favor of the POA Officers with regards to Plaintiffs' negligence claims is appropriate because the Plaintiffs have failed to allege an individual duty owed to the Plaintiffs by any of the POA Officers, and in any event the POA Officers were acting in good faith in their

official capacities as officers of a non-profit corporation at all relevant times, rendering their conduct immune from liability under Idaho law.

Under Idaho law, the elements of a negligence claim are “(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant’s conduct and the resulting injury; and (4) actual loss or damage.” *Shea v. Kevic Corp.*, 156 Idaho 540, 328 P.3d 520, 528 (2014).

1. Plaintiffs Have Failed to Allege any Individual Duty Owed to the Plaintiffs by any of the POA Officers.

The Plaintiffs have failed to allege any individual duty owed to the Plaintiffs by any of the POA Officers.

“Absent unusual circumstances, a person has no duty to prevent harm to another, regardless of foreseeability. Idaho law recognizes two circumstances in which a person has an affirmative duty of care to another: a special relationship or an assumed duty based on an undertaking.” *Beers v. Corp. of Pres. of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 686, 316 P.3d 92, 98.

The first circumstance giving rise to an affirmative duty of care is the existence of a special relationship. *Id.*; *See also Rees v. State, Dep’t of Health & Welfare*, 143 Idaho 10, 15 (2006) (“An affirmative duty to aid or protect arises only when a special relationship exists between the parties.”). A special relationship exists under one of two possible conditions: “(a) a special relation exists between the actor and a third person which imposes a duty upon the actor to control the third person’s conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.” *Beers*, 316 P.3d at 98. Examples of special relationships recognized by Idaho law include “a parent’s duty to control his child, an employer’s duty to control an employee

while at work, or a law enforcement officer's duty to control a dangerous prisoner." *Id.* (citing *Turpen v. Granieri*, 133 Idaho 244, 248 (1999)).

The second circumstance giving rise to an affirmative duty of care is an assumed duty based on an undertaking. "Even when an affirmative duty generally is not present, a legal duty may arise if one voluntarily undertakes to perform an act, having no prior duty to do so." *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 350 (2008). "In such a case, the acting party has a duty to perform that act in a non-negligent manner." *Beers*, 316 P.3d at 100. "When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed." *Martin v. Twin Falls Sch. Dist. No. 411*, 138 Idaho 146, 150 (2002). For example, "[a] beach-goer may assume a duty to rescue a drowning swimmer in a non-negligent manner by undertaking to do so, but that same beach-goer has no obligation to rescue anyone else." *Beers*, 316 P.3d at 100.

In this case, the FAC fails to allege, and the undisputed facts fail to support, an individual duty owed to the Plaintiffs on the part of any of the POA Officers. None of the FAC's allegations against the POA Officers or the undisputed facts can be construed in any manner as alleging the existence of a special relationship between any of the individual POA Officers and the Plaintiffs. Nor can the FAC's allegations or the undisputed facts be construed in any manner as alleging that any of the POA Officers assumed or otherwise undertook an individual, affirmative duty with regards to the Plaintiffs.

2. The POA Officers Were Acting in Good Faith in Their Official Capacities as Officers of a Non-Profit Corporation at all Relevant Times, Rendering Their Conduct Immune From Liability Under Idaho Law.

Even assuming *arguendo* that the POA Officers assumed an individual duty with regards to the Plaintiffs, the POA Officers were acting in good faith in their official capacities as officers of a

non-profit corporation at all relevant times, rendering their conduct immune from liability under Idaho law.

Idaho Code § 30-3-85(1) sets forth the standards of conduct for officers of a non-profit corporation such as Sagecrest:²

An officer with discretionary authority shall discharge his duties under that authority:

- (a) In good faith;
- (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (c) In a manner the officer reasonably believes to be in the best interests of the corporation and its members, if any.

Section 30-3-85(2) permits an officer in discharging his duties to “rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by . . . persons as to matters the officer reasonably believes are within the person’s professional or expert competence.”

Section 30-3-85 also provides immunity for an officer who complies therewith: “An officer is not liable to the corporation, any member, or other person for any action taken or not taken as an officer, if the officer acted in compliance with this section.” I.C. § 30-3-85(5). Significantly, the immunity provided by § 30-3-85(5) is not limited to an officer’s liability to the corporation or its members, but includes an officer’s liability to any “other person.” *See also Wisdom v. Centerville Fire Dist., Inc.*, 2008 WL 4372009 *1-*2 (D. Idaho Sept. 22, 2008) (adopting Report and

² Idaho Code § 30-3-80 sets forth the standards of conduct for members of a board of directors of a non-profit corporation. The FAC alleges only that the POA Officers acted as officers of Sagecrest, and not as members of the board of directors thereof. To the extent Plaintiffs argue that the individuals are liable as a result of their actions as board members, the analysis set forth in Sec. IV.A.2 is equally applicable under § 30-3-80.

Recommendation of magistrate judge concluding “that the officers of the corporation are immune from liability under Idaho’s Non-profit Corporation Act, Idaho Code § 30–3–80(4)”).

In this case, it is undisputed that the POA Officers discharged their duties as officers of Sagecrest in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances. It is further undisputed the POA Officers reasonably believed that they were acting in the best interests of Sagecrest and its members. Mr. Kalsbeek obtained information regarding carbon monoxide testing procedures from IGC, as well as other reliable sources, and used this information to help draft written carbon monoxide testing procedures for Sagecrest. None of the actions on the part of the POA Officers can be characterized as anything other than good faith efforts to be helpful in dealing with carbon monoxide issues and based on reasonable reliance on information provided by persons with relevant professional experience. Accordingly, the immunities afforded to the POA Officers under Idaho Code render summary judgment appropriate for all claims made against the POA Officers.

B. *Summary Judgment in Favor of the POA Officers with Regards to Plaintiffs’ IIED Claim is Appropriate Because Plaintiffs Fail to Allege that the POA Officers Engaged in Extreme or Outrageous Conduct and the POA Officers Lacked the Requisite Intent to Inflict Emotional Harm.*

Summary judgment in favor of the POA Officers with regards to Plaintiffs’ IIED claim is appropriate because Plaintiffs fail to allege that the POA Officers engaged in extreme or outrageous conduct and the POA Officers lacked the requisite intent to inflict emotional harm.

Under Idaho law, “four elements are necessary to establish a claim of intentional infliction of emotional distress: (1) the conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe.” *Edmondson v. Shearer*

Lumber Prod., 139 Idaho 172, 179 (2003). “Courts have required very extreme conduct before awarding damages for the intentional infliction of emotional distress.” *Id.* To support a claim of intentional infliction of emotional distress, conduct must be more than merely “unjustifiable,” but rather must rise to the level of “atrocious” behavior “beyond all possible bounds of decency.” *Id.* at 180. “To be actionable, the conduct must be so extreme as to arouse an average member of the community to resentment against the defendant, and must be more than unreasonable, unkind, or unfair.” *Mortensen v. Stewart Title Guar. Co.*, 149 Idaho 437, 447 (2010) (internal quotations omitted).

1. Plaintiffs Fail to Allege that the POA Officers Engaged in Extreme or Outrageous Conduct.

Whether or not a given set of facts satisfies the element of extreme or outrageous conduct for IIED purposes may be appropriately decided by a court in the context of a summary judgment motion or motion to dismiss:

To the extent that [plaintiff] suggests a district court judge cannot rule that, as a matter of law, certain conduct does not rise (or sink) to the extreme and outrageous level required to state a claim for intentional infliction of emotional distress, she attempts to prove too much. It is well accepted that intentional infliction of emotional distress claims may entirely appropriately be dealt with on summary judgment or in a motion to dismiss.

Miller v. Curie, 50 F.3d 373, 377–78 (6th Cir. 1995) (emphasis added). *See also Stuto v. Fleishman*, 164 F.3d 820, 827 (2d Cir. 1999) (affirming dismissal of an intentional infliction of emotional distress claim on a Rule 12(b)(6) motion where the plaintiff failed to allege conduct that was sufficiently extreme and outrageous).

No reasonable reading of FAC’s allegations regarding the POA Officers alleges “very extreme conduct” that was “atrocious” and “beyond all possible bounds of decency.” *Edmondson*

Prod., 139 Idaho at 179-180. *See also Alahverdian v. Grebinski*, 2014 WL 2048190, *17 (S. D. Ohio 2014) (“It is the rare case that reaches the very high bar of showing ‘extreme and outrageous’ conduct.”) In comparison, examples of conduct that has been deemed sufficiently extreme and outrageous by Idaho courts include: an insurance company speciously denying a grieving widower’s cancer insurance claim while simultaneously impugning his character and drawing him into a prolonged dispute, *Walston v. Monumental Life Ins. Co.*, 129 Idaho 211, 219–20 (1996); prolonged sexual, mental, and physical abuse inflicted upon a woman by her co-habiting boyfriend, *Curtis v. Firth*, 123 Idaho 598, 605-07 (1993); and real estate developers swindling a family out of property that was the subject of their lifelong dream to build a Christian retreat, *Spence v. Howell*, 126 Idaho 763, 773-74 (1995). *C.f. Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 643 (2012) (no extreme and outrageous conduct where at-will employee abruptly fired, given brief amount of time to collect belongings, and escorted from building); *Kerr v. Bank of America, Idaho, N.A.*, 2011 WL 11047661, *4 (Ct. App. 2011) (bank’s charging of overdraft fees not extreme and outrageous conduct).

Indeed, at oral argument regarding Plaintiffs’ motion for leave to file their proposed FAC, the Court ruled that, pursuant to *Edmondson, supra*, the allegations set forth therein failed to allege extreme and outrageous conduct. “There is . . . nothing in the allegation[s] contained in the proposed amended complaint that would show extreme or outrageous conduct on the part of the particular defendants.” (*Tr. of Hearing of July 3, 2014* (“Tr.”), 31:8-11.)³ The Court denied the Hymas plaintiffs leave to amend to add their own IIED claim in addition to Ms. Halowell’s: “Now, with

³ A true and correct excerpted copy of the transcript pages cited herein is attached hereto at Exhibit A.

regard to the four additional Hymas plaintiffs, obviously I'm not allowing them to come in for intentional infliction of emotional distress." (*Tr.*, 32:7-10.)

Though the events in this case were tragic, the alleged conduct of the POA Officers in this case, as a matter of law, in no way rises to the level of such heinous conduct as prolonged physical and sexual abuse.

2. The POA Officers Lacked the Requisite Intent to Inflict Emotional Harm.

Summary judgment in favor of the POA Officers with regards to Plaintiffs' IIED claim is also appropriate because the POA Officers lacked the requisite intent to inflict emotional harm.

Significantly, "[t]he tort[] of . . . intentional infliction of emotional distress require[s] intent to commit the tort." *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 947 (1993). *See also Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991) ("It is the intent to harm one emotionally that constitutes the basis for the tort of an intentional infliction of emotional distress." (emphasis added)); *Thorpe v. Breathitt Cty Bd. of Educ.*, -- F. Supp. 2d --, 2014 WL 1101035, *11 (E. D. Ky. March 21, 2014 (summary judgment in favor of defendants on IIED claim appropriate even though their "actions may have been careless and arguably even deliberately indifferent . . . they were not acting with intent to cause harm to [the plaintiff]."); *Norris v. Metro-North Commuter Rail Co.*, 522 F. Supp. 2d 402, 415-16 (D. Conn. 2007) (summary judgment in favor of defendants on IIED claim appropriate where plaintiff "failed to show that Defendants intended to cause this harm through their conduct.").

In this case, it is undisputed that at no point in time did any of the POA Officers undertake any action, or decline to take any action, with the intent to inflict emotional harm on any of the Plaintiffs. (*Kalsbeek Aff.*, ¶ 14; *Arla Aff.*, ¶ 6; *Schwab Aff.*, ¶ 6; *Meisner Aff.*, ¶ 6.)

V. CONCLUSION

For the reasons stated herein, summary judgment in favor of the POA Officers on all of Plaintiffs' claims is appropriate.

DATED this 17th day of October, 2014.

BRASSEY, CRAWFORD & HOWELL, PLLC

By 

John M. Howell, Of the Firm
Attorneys for Defendants Jon Kalsbeek, Jay
Arla, Christopher Schwab and David Meisner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 2014, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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John M. Howell

1 In The District Court of the Fourth Judicial District

2 In and for the County of Ada

3
4 TRAVIS FORBUSH and GRETCHEN) Case No. CVP1-1304325
5 HYMAS, individually and as the)
6 natural parents of PRIVATE FIRST)
7 CLASS MCQUEN C. FORBUSH, USMC)
(Deceased), and BREANNA)
8 HALOWELL,)

9 Plaintiffs,

10 vs.

11 SAGECREST MULTI FAMILY PROPERTY)
12 OWNERS' ASSOCIATION, INC., an)
13 Idaho non-profit corporation,)
14 dba SAGECREST MULTI FAMILY)
PROPERTY OWNERS; ASSOCIATION;)
15 et al,)

16 Defendants.

17
18 TRANSCRIPT OF PROCEEDINGS

19
20 Held on July 3, 2014, before Cheri C. Copsey, district
21 court judge.

COPY

22
23
24
25
EXHIBIT

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27

1 theory. There was a recognized legal duty to act
2 in a certain manner toward that -- toward the
3 parents' child. That's the duty that was at
4 issue. Just because the father was not present
5 and the mother was present does not convert them
6 into some other thing. This wasn't somebody who
7 was on the play yard making a claim against the
8 school district. This was the parent to whom a
9 legal duty is owed. That's what the -- that case
10 was about.

11 MR. LOGAN: Thank you, Your Honor.

12 THE COURT: Thank you. Anything further?

13 I'm going to take a brief recess. I
14 will take brief recess.

15 (Recess)

16 THE COURT: Mr. Haman, are you still there?

17 MR. HAMAN: Yes, I am. Thank you.

18 THE COURT: All right. If you want to mute
19 it so I don't get distracted. At my age sometimes
20 things easily distract me.

21 MR. HAMAN: Okay. Thank you.

22 THE COURT: All right. In this case the
23 plaintiffs have moved to amend the third amended
24 complaint to include the following changes: Add
25 additional plaintiffs, add additional claims,

29

1 According to the Idaho law, we've
2 limited -- we have a rule that in general
3 principle every person in the conduct of his or
4 her business has a duty to exercise ordinary care
5 to prevent unreasonable or foreseeable risk of
6 harm to others. Idaho limited this rule and found
7 that Idaho law recognizes two circumstances in
8 which a person has an affirmative duty of care to
9 another: A special relationship or an assumed
10 duty based on an undertaking. And I cite to a
11 couple of cases. One is *Boots ex rel. Boots*
12 *versus Winters*, 145 Idaho 389, and *Beers versus*
13 *Corporation of the President of the Church of*
14 *Jesus Christ of Latter Day Saints*, 155 Idaho 680,
15 a 2013 case.

16 In addition, according to Idaho courts,
17 a landlord is under a duty to exercise reasonable
18 care in light of all circumstances. It is for
19 that reason that Brianna Halowell is in a unique
20 and distinct category because she is a guest of a
21 tenant, and, therefore, the landlord and some
22 others owe her a specific duty.

23 Now, the purpose of the Court's
24 involvement in reviewing a potential amendment is
25 to make sure that we are not wasting everyone's

28

1 delete those defendants who have been dismissed,
2 and any claims or facts discussing those
3 defendants with the exception of Goodman
4 Manufacturing, who apparently settled the motion
5 to -- prior to the motion to amend being filed. I
6 would assume that's going to be corrected to
7 delineate which plaintiffs are suing which
8 defendants and to make minor or correct
9 grammatical errors and to add the punitive claim
10 language to certain claims.

11 As the parties are well aware, under
12 Rule 15(a), leave for amendments should be freely
13 given when justice so requires. However, as the
14 defendants have noted, one of the bases for a
15 Court to deny a motion to amend would be if the
16 pleading fails to set out a valid claim. In other
17 words, the amendment would be futile.

18 In this particular case, I want to
19 address a couple things before I get into it. I
20 -- going back and reviewing *Gill*, *Gill* is not an
21 analysis of duty. That's not what *Gill* is all
22 about.

23 And I want to make it really clear that
24 Idaho does not have this kind of general I owe a
25 duty of care to the world. That's not what it is.

30

1 time because if you're amending to add causes of
2 action which are not recognized under Idaho law,
3 it is a futile amendment.

4 So with that in mind, I have reviewed
5 the requested amendment. With regard to paragraph
6 58, which essentially is reckless and gross
7 negligence, I think the defendants are correct,
8 this was thoroughly hashed out at oral argument on
9 February 27th, 2014. I feel very strongly there's
10 no point in amending complaints to add language
11 that does nothing. It doesn't add a new cause of
12 action, especially where reckless and gross
13 negligence is just a way to get at punitive
14 damages. And if the parties feel that there is a
15 punitive damage claim, they should have brought
16 it. But we're not going to amend just to add that
17 kind of language and it's not relevant to the
18 other issues that are presented in the motion to
19 amend.

20 As I indicated in the discussion with
21 one of the parties, it's conclusory. It's a legal
22 -- it's a word, but it is not a factual
23 allegation.

24 Now, with regard to the amendments
25 alleging intentional infliction of emotional

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1 distress, the Court is going to deny any amendment
2 with regard to that. I find that it is futile to
3 allow such an amendment.

4 In Idaho parties have recognized there
5 are four elements that are necessary to establish
6 a claim of intentional infliction of emotional
7 distress. The conduct must be intentional or
8 reckless. There is no -- nothing in the
9 allegation contained in the proposed amended
10 complaint that would show extreme or outrageous
11 conduct on the part of the particular defendants.

12 The Idaho courts have been very clear
13 in requiring very extreme conduct before awarding
14 damages for intentional infliction of emotional
15 distress. And one of the cases that I would cite
16 is the *Edmondson versus Shearer Lumber Products* at
17 135 Idaho 172, 2003, a Supreme Court case. The
18 conduct must be extreme and outrageous and there
19 has to be a causal connection between the wrongful
20 conduct and the emotional distress. And, finally,
21 the emotional distress must be severe. It is not
22 sufficient to simply allege the emotional distress
23 must be severe. Facts must be alleged that
24 suggest that the conduct was intentional or
25 reckless, extreme and outrageous as well as other

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1 the plaintiffs are not situations that address the
2 bystander liability.

3 I would suggest that -- that before we
4 willy-nilly adopt the bystander standard that is
5 suggested by the plaintiffs -- and I want to use
6 sort of an analogy. It would be like there's a
7 car accident at the side of I-84, a horrible car
8 accident. The lookie-loo's start driving down the
9 street. And the lookie-loo's who just happen to
10 see and happen upon it, under the theory that
11 seems to be advanced by the plaintiffs, would have
12 a cause of action against the individual who
13 original -- who originally caused the accident.
14 That certainly is not the law here in Idaho. And
15 it's not the law, quite frankly, in any of the
16 areas that have adopted the bystander exception.

17 In fact, in those states -- and, again,
18 I want to emphasize Idaho has not adopted this
19 standard. This is a legal principle. This is not
20 a factual principle. This is a legal principle;
21 you've got to show that there is a legal duty
22 owed.

23 But the states that have, if you look
24 at it, they do have certain things that are
25 required. First, the bystander either has to be

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1 elements.

2 And I find that at this point nothing
3 in the proposed complaint alleges conduct that was
4 intentional, reckless, extreme or outrageous. And
5 so I'm going to deny any amendment alleging the
6 emotional distress.

7 Now, with regard to the addition of the
8 four additional Hymas plaintiffs, obviously I'm
9 not allowing them to come in for intentional
10 infliction of emotional distress. And I think by
11 just addressing the issue of negligent infliction
12 of emotional distress addresses the Hymas
13 plaintiffs.

14 Contrary to what has been argued here,
15 duties -- the duty for reasonable care only
16 applies to specific circumstances where the person
17 has an affirmative duty of care to another. The
18 plaintiffs in this case have admitted that with
19 regard to the new plaintiffs, that the basis of
20 that duty for reasonable care is what they call --
21 what has been called the -- I'm getting a little
22 bit tired -- the bystander exception.

23 Contrary to the arguments made, Idaho
24 has never addressed specifically the bystander
25 duty and those cases that have been identified by

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1 at the scene where the event occurred. There is
2 no allegation, even if we recognize the bystander
3 exception, and we don't, but if we did, there is
4 no allegation that any of the four Hymas
5 plaintiffs were present at the event itself. They
6 came up after the events. They were not at the
7 scene before it was substantially changed. And
8 they were not in the zone of danger. They came up
9 later.

10 And if you look -- like I said, you
11 look through all of these cases -- and we did
12 spend quite a bit of time going through all of
13 these cases -- that's pretty uniform throughout
14 those jurisdictions that have adopted it.

15 If Idaho were to adopt the bystander
16 law as determined in these other states, I find
17 that the Fourth Amendment complaint would not
18 state a valid claim for negligent infliction of
19 emotional distress as to the minor plaintiffs or
20 to Gretchen Hymas individually. The facts pled in
21 the amended complaint do not allege that the
22 children nor Ms. Hymas, witnessed the event,
23 unlike Brianna Halowell.

24 And as I indicated, I would find that
25 there is a potential claim for negligent

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1 R E P O R T E R ' S C E R T I F I C A T E

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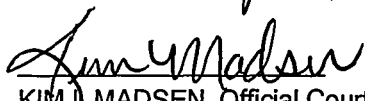
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I, KIM I. MADSEN, Official Court
Reporter, County of Ada, State of Idaho, hereby
certify:

That I am the reporter who took the
proceedings had in the above-entitled action in
machine shorthand and thereafter the same was
reduced into typewriting under my direct
supervision; and

That the foregoing transcript contains
a full, true, and accurate record of the
proceedings had in the above and foregoing cause,
which was heard at Boise, Idaho.

IN WITNESS WHEREOF, I have hereunto set
my hand this 23 day of July, 2014.


KIM I. MADSEN, Official Court Reporter
CSR No. 428

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OCT 30 2014

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DEPUTY

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Attorneys for Plaintiffs

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC (Deceased);
and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS' ASSOCIATION,
INC.;

JON KALSBECK, Individually and as
President of the Sagecrest Multi Family
Property Owners' Association;

JAY ARLA, Individually and as Vice
President of the Sagecrest;

CHRIS SCHWAB, Individually and as

Case No. CV PI 1304325

**FOURTH AMENDED COMPLAINT
AND
DEMAND FOR JURY TRIAL**

TR

Secretary of the Sagecrest;

DAVID MEISNER, Individually and as
Treasurer of the Sagecrest;

FIRST RATE PROPERTY MANAGEMENT,
Inc.;

TONY DROST, individually and as President
of First Rate Property Management, Inc.;

A.O. SMITH, Inc.;

MATTHEW E. SWITZER, TRUST, and
MATTHEW E. SWITZER, individually and as
Trustee of the Matthew E. Switzer, Trust;

ANFINSON PLUMBING, LLP; and

DANIEL BAKKEN, individually, and as the
employee of Anfinson Plumbing, LLP,

Defendants.

I. INTRODUCTION

1. This is a wrongful death and personal injury case arising from the death of Private First Class McQuen C. Forbush, USMC, and injuries suffered by PFC Forbush's girlfriend Breanna Halowell from carbon monoxide poisoning at the Sagecrest Apartment complex in Meridian, Idaho on November 10, 2012.

II. PARTIES

2. At all times relevant to these proceedings the Plaintiffs Travis Forbush and Gretchen Hymas were the natural parents of PFC Forbush.

3. At all times relevant to these proceedings the Plaintiff Breanna Halowell resided in Ada County, Idaho.

4. At all times relevant to these proceedings, the Defendant Sagecrest Multi Family Property Owners' Association, Inc., (hereinafter "Sagecrest POA") was an Idaho non-profit corporation, that conducted business from its principal place of business at 1805 E. Overland Rd., Ste. 58, Meridian, in Ada County, Idaho.

5. At all times relevant to these proceedings, Jon Kalsbeek was acting as the President of the Sagecrest POA, and had knowledge of the dangerous conditions that existed at the Sagecrest Complex. Mr. Kalsbeek resides in Reno, Nevada.

6. At all times relevant to these proceedings, Jay Arla was acting as the Vice-President of the Sagecrest POA, and had knowledge of the dangerous conditions that existed at the Sagecrest Complex. Mr. Arla resides in Portland, Maine.

7. At all times relevant to these proceedings, Chris Schwab was acting as the Secretary of the Sagecrest POA, and had knowledge of the dangerous conditions that existed at the Sagecrest Complex. Mr. Schwab resides in Cupertino, California.

8. At all times relevant to these proceedings, David Meisner was acting as the Treasurer of the Sagecrest POA, and had knowledge of the dangerous conditions that existed at the Sagecrest Complex. Mr. Meisner resides in Meridian, Idaho.

9. At all times relevant to these proceedings, First Rate Property Management, Inc., (hereinafter "First Rate") was an Idaho Corporation with its principal place of business at 7150 Potomac, Boise, in Ada County, Idaho. Defendant Sagecrest POA contracted with First Rate to provide property management services to the Sagecrest Apartment Complex and First Rate was acting as the property manager for the Sagecrest POA and Building 46 on November 10, 2012.

10. At all times relevant to these proceedings, Tony Drost was acting as the President of First Rate and had knowledge of the dangerous conditions that existed at the Sagecrest Complex.

11. At all times relevant to these proceedings, A.O. Smith, Inc. was a Delaware corporation, and was doing business in Idaho from its principle place of business in Milwaukee, Wisconsin. A.O. Smith designed, manufactured and sold the water heater installed in Apartment 4624.

12. At all times relevant to these proceedings, the Matthew E. Switzer, Trust was registered in Idaho and its trustee Matthew E Switzer was responsible to the trust to make all decisions related to trust business, and had knowledge of the dangerous conditions that existed at the Sagecrest Complex, including Apartment 4624. The Matthew E. Switzer, Trust is the registered owner of Building 46 at the Sagecrest Apartment Complex.

13. At all times relevant to these proceedings Anfinson Plumbing, LLP was an Idaho Limited Liability Partnership, with its principal place of business at 4949 N. Sunderland Dr. Boise, Idaho, and was licensed by the State of Idaho as a Plumbing and HVAC Contractor.

19. At all times relevant to these proceedings, Daniel Bakken was licensed as a journeyman plumber by the State of Idaho, and was an employee of Defendant Anfinson Plumbing, LLP. Mr. Bakken was acting in the course and scope of his employment at all times relevant to this case.

III. JURISDICTION & VENUE

22. Jurisdiction is proper as many of the Defendants reside in Ada County, Idaho or have their principal places of business in Ada County, Idaho.

23. Jurisdiction is proper for any out-of-state Defendants as they are subject to jurisdiction in Idaho under Idaho's Long Arm Statute.

24. Jurisdiction in the District Court is proper as the amounts sought for damages in this litigation exceed \$10,000.00, the jurisdictional limit of the court.

IV. FACTS COMMON TO ALL CAUSES OF ACTION

25. PFC Forbush had graduated from Columbia High School in Nampa, Idaho and had voluntarily enlisted in the United States Marine Corps. It was PFC Forbush's dream, since early childhood, to be a United States Marine. PFC Forbush was home on leave after recently completing rigorous physical training at Marine Corps Boot Camp located at the Marine Corps Recruit Depot in San Diego, California.

26. PFC Forbush was 18 years old when he died.

27. The Ada County Coroner confirmed the cause of PFC Forbush's death was "carbon Monoxide due to inhalation of products of combustion," and found a Carboxy-hemoglobin concentration of 54%, which the Coroner concluded was "well within the concentration that would result in death."

28. The Sagecrest Apartment complex includes 48 separate buildings, each with four apartments. The separate buildings are owned by individuals or entities and each owner is a shareholder in the Sagecrest POA. The Sagecrest POA contracted with a property manager, First Rate, which performed day-to-day administrative duties such as charging and collecting rent, showing vacant apartments, and contracting with new tenants. The property manager also coordinated all necessary inspections and repairs for the apartments.

29. The Mathew E. Switzer, Trust owns Building 46, which includes Apartment 24, (the "apartment") in which PFC Forbush died.

30. PFC Forbush and Breanna Halowell were staying at the Sagecrest Apartments on November 8, 9, and 10, 2012, as the invited guests of Sagecrest tenant Adra Kipper.

31. The Sagecrest POA and each individual building owner, including Defendant the Matthew E. Switzer Family Trust, contracted with First Rate, a property management company, to provide property management services for the building owners and the Sagecrest POA.

32. In early 2012, First Rate gave written notice to many of its tenants, including the tenant in apartment 4624, Adra Kipper, that First Rate had conducted inspections and found "higher levels of carbon monoxide than we would like to see." First Rate then confirmed the source of the deadly gas: "the carbon monoxide is exiting through the vent on top of the water heater but does have the potential of entering the unit." First Rate also promised that it would replace the defective water heaters "next week." However, as of November 10, 2012, many months after First Rate sent this "notice" and promised swift action to remove this known danger, it had not replaced the water heater in apartment 4624. (A true and correct copy of this "notice" is attached as **Exhibit 1.**)

33. On information and belief, First Rate informed the president and officers of the Sagecrest POA and building owner the trustee of the Matthew E. Switzer, Trust of the dangerous conditions caused by the defective water heaters well before November 10, 2012. However, despite this knowledge, none of these defendants took the appropriate action to rectify or alleviate the deadly situation that existed in Building 46 and throughout the Sagecrest complex.

34. First Rate also provided small portable carbon monoxide detectors to tenants after determining deadly carbon monoxide was present in the apartments. However, the detector provided to apartment 4624 did not work.

35. The tenant, Adra Kipper, informed First Rate on several occasions prior to November 10, 2012, that her apartment would get and remain hot, despite turning the wall-mounted thermostat¹ down or off.

36. Carbon monoxide is a colorless, odorless gas that is slightly lighter than air and poisonous when inhaled.

37. Carbon monoxide is rapidly absorbed through the lungs and has a greater affinity to hemoglobin than oxygen, displacing oxygen and creating carboxyhemoglobin, which reduces oxygen transport, delivery, and utilization by the body causing tissue hypoxia and eventual death by suffocation.

38. The duration and severity of symptoms of carbon monoxide poisoning and the likelihood of death are dependent upon conditions such as the concentration of carbon monoxide in the air, the duration of exposure, and the general health of the individual exposed.

39. Carbon monoxide results from incomplete combustion of fuels such as natural gas in gas-fired water heaters, often due to an improper fuel-air mixture from an inadequate supply of fresh air.

40. The source of the carbon monoxide that killed PFC Forbush was a water heater manufactured by A.O. Smith — the only source of carbon monoxide in the apartment. The carbon monoxide was being circulated throughout the apartment by the Hydronic Air Handler.

41. At the time first responders arrived to the Apartment on November 10, 2012, PFC Forbush was found on the floor of the master bedroom with blood hemorrhaged from his mouth and nose. The temperature in the apartment was 86 degrees when the Meridian Police found PFC Forbush.

¹ There is also a "thermostat" located on the water heater that controls the temperature of the water.

42. Following PFC Forbush's death, the Sagecrest POA, and each of its Officers named herein sent a letter to First Rate prohibiting First Rate from warning other tenants of the dangers at the complex. The letter stated: "I am instructing you to make no comments and to have no discussions with anyone, whether media representatives, tenants, owners or anyone concerning the recent events at Sagecrest involving the death of a young man as the alleged result of CO poisoning." (A true and correct copy of this letter is attached as **Exhibit 2**.)

43. On or about April 27, 2009, Defendant Anfinson Plumbing investigated a complaint of "no hot water" in Apartment 4624. The Anfinson Plumbing plumber reported: "We removed and cleaned the burner assembly. We re-assembled the burner, we replaced a bad thermocouple and a couple connectors."

44. In March 2010, Sagecrest POA contracted with First Rate Property Management.

45. On April 18, 2010 Intermountain Gas responded to a "carbon monoxide call" to Apartment 1311 at Sagecrest and registers 300 ppm² of CO. Intermountain Gas "red tagged" the water heater and refused to deliver gas to the Apartment until the water heater was replaced.

46. From June until December 2010, Express Plumbing replaced 25 "thermocouples" and 2 water heaters, and cleaned the "flash arrestors" on 3 other water heaters.

47. Intermountain Gas conducted an inspection on April 15, 2011 after which its technician reported that he believed the water heaters with the intake in the bottom (A.O. Smith models) were clogging from "lint, hair and debris."

48. On July 20, 2011 there was a carbon monoxide incident at Sagecrest, and Intermountain Gas tested deadly levels in Apartment 1811. Intermountain Gas and First Rate Property Management met regarding the ongoing carbon monoxide problems at Sagecrest.

² "PPM" refers to the measurement of gas or vapor at "parts per million."

49. In September 2011, the Sagecrest Board of Directors approved a contract with Engineering Consultants Incorporated (hereinafter "ECI"), a local engineering firm, to conduct a "Water Heater Site Investigation" at Sagecrest. ECI confirmed the problem was with the "flame arrestor" or intake vent clogging on A.O. Smith water heaters and reported its findings to the Sagecrest Board of Directors and First Rate.

50. On March 12, 2012, First Rate requested Intermountain again test for CO. First Rate had obtained its own CO detector and wanted instruction from Intermountain Gas for appropriate testing procedures, which Intermountain Gas provided. Intermountain Gas tested the water heater in Apartment 4624 and registered "19 ppm CO at draft hood, but none found outside hood." Intermountain Gas told First Rate that any water heater tested at over 50 ppm would be red tagged, and Intermountain Gas would not deliver gas until the water heater was either cleaned or replaced.

51. In March 2012, before contacting Intermountain Gas and requesting that Intermountain Gas provide carbon monoxide testing, First Rate personal tested the water heater in Apartment 4624, for CO and got a reading of 100 ppm, using a CO meter the POA had purchased. First Rate personnel shared the high CO readings First Rate had obtained in several apartments, including 4624, with Intermountain Gas's personnel during the March 2012 CO testing and inspections at Sagecrest.

52. From March 2012 until McQuen died on November 10, 2012, First Rate did not conduct any additional CO testing in Apartment 4626, nor did it install a permanent CO detector, nor did it investigate to determine whether the "portable CO detector" delivered to Apartment 4624 was installed or working properly.

53. Defendant Kalsbeek interceded after the March 2012 meeting with Intermountain Gas and directed First Rate personal to disregard the testing procedures as instructed by Intermountain Gas. Kalsbeek directed First Rate not to test in the water heater flu, but to test in the apartment.

54. Thereafter Defendant Drost instructed First Rate personal to disregard the Intermountain gas testing procedures because he did not want First Rate to lose the Sagecrest account.

55. On October 10, 2012, Intermountain Gas was again called to Sagecrest regarding CO. The Meridian Fire Department reported testing 90 ppm in Apartment 3324. The Intermountain Gas technician tested 55 ppm.

56. Even after the October 10, 2012, CO incident, First Rate failed to ensure that there were working CO detectors in all Sagecrest Apartments.

57. In February 2013 representatives from the respective parties inspected and removed the A.O. Smith water heater from Apartment 4624 and disassembled it. Upon inspection of the burner assembly, the parties discovered a factory installed safety device, called a thermo cut off ("TCO"), had been removed and a standard thermocouple without a TCO had been installed.

**V. FIRST CAUSE OF ACTION – PLAINTIFFS TRAVIS FORBUSH, GRETCHEN HYMAS, AND
BREANNA HALOWELL
– NEGLIGENCE –
DEFENDANTS MATTHEW E. SWITZER, TRUST, AND MATTHEW E SWITZER**

58. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

59. As the Building owner, Defendants Matthew E. Switzer, Trust, and Matthew E Switzer owed PFC Forbush and Breanna Halowell a duty to exercise reasonable care under the circumstances.

60. Defendants Matthew E. Switzer, Trust, and Matthew E Switzer breached and violated their duty of care to PFC Forbush and Breanna Halowell.

61. The acts and omissions constituting such breaches and violations include, but are not limited to, the following:

- a. Failure to exercise reasonable care under all of the circumstances;
- b. Failure to provide and/or maintain the apartment in a safe and sanitary condition fit for human habitation;
- c. Failure to provide and/or maintain the apartment's water heater, air handler, and heating system in a reasonably safe condition;
- d. Failure to perform a reasonable inspection of the apartment — including a reasonable inspection of the apartment's water heater and ventilation system after determining the water heater was leaking carbon monoxide;
- e. Failure to test or confirm the carbon monoxide detectors were installed properly and working after delivering carbon monoxide detectors to Apartment 4624; and,
- f. Failure to adequately warn of the unreasonably dangerous condition in apartment 4624.

62. PFC Forbush died and Breanna Halowell suffered severe and possibly permanent injuries, as a direct and proximate result of the negligent acts and omissions of Defendants Matthew E. Switzer, Trust, and Matthew E Switzer.

63. Travis Forbush, Gretchen Hymas, and Breanna Halowell are therefore entitled to recover damages for personal injury and wrongful death in amounts to be proven at trial.

64. Defendants Matthew E. Switzer, Trust, and Matthew E Switzer are also vicariously liable for the negligence/recklessness of their agent, Defendant First Rate.

**VI. SECOND CAUSE OF ACTION - PLAINTIFFS TRAVIS FORBUSH, GRETCHEN HYMAS, AND
BREANNA HALOWELL
- NEGLIGENCE -
DEFENDANTS — SAGECREST POA, JON KALSBECK, JAY ARLA, CHRIS SCHWAB, AND DAVID
MEISNER**

65. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

66. Defendants Sagecrest POA and Jon Kalsbeek , Jay Arla, Chris Schwab, and David Meisner owed PFC Forbush and Breanna Halowell a duty to exercise reasonable care under the circumstances.

67. Defendants Sagecrest POA, Jon Kalsbeek, Jay Arla, Chris Schwab, and David Meisner breached and violated their duty of care to PFC Forbush and Breanna Halowell.

68. The acts and omissions constituting such breaches and violations include, but are not limited to, the following:

- a. Failure to exercise reasonable care under all of the circumstances;
- b. Failure to provide and/or maintain the apartment in a safe and sanitary condition fit for human habitation;
- c. Failure to provide and/or maintain the apartment's water heater, air handler, and heating system in a reasonably safe condition;

- d. Failure to perform a reasonable inspection of the apartment — including a reasonable inspection of the apartment's water heater, air handler and ventilation system after determining the water heater was leaking carbon monoxide;
- e. Failure to test or confirm the carbon monoxide detectors were installed properly and working after delivering carbon monoxide detectors to Apartment 4624; and,
- f. Failure to adequately warn of the unreasonably dangerous condition in apartment 4624.

69. PFC Forbush died and Breanna Halowell suffered severe and possibly permanent injuries, as a direct and proximate result of the negligence, and otherwise wrongful acts and omissions of Defendants Sagecrest POA, Jon Kalsbeek, Jay Arla, Chris Schwab, and David Meisner.

70. Travis Forbush, Gretchen Hymas, and Breanna Halowell are therefore entitled to recover damages for personal injury and wrongful death in amounts to be proven at trial.

71. Defendants Sagecrest POA, Jon Kalsbeek, Jay Arla, Chris Schwab, and David Meisner Trustee are also vicariously liable for the negligence/recklessness of their agent, Defendant First Rate.

**VII. THIRD CAUSE OF ACTION — PLAINTIFFS TRAVIS FORBUSH, GRETCHEN HYMAS, AND
BREANNA HALOWELL
— NEGLIGENCE —
DEFENDANTS FIRST RATE AND DROST**

72. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

73. Defendants First Rate and Drost owed PFC Forbush and Breanna Halowell a duty to exercise reasonable care under the circumstances.

74. Defendants First Rate and Drost breached and violated their duty of care to PFC Forbush and Breanna Halowell.

75. Defendant Tony Drost was personally negligent and/or reckless, or knew of and approved and/or ratified the negligence and/or recklessness of First Rate's employees.

76. Such breaches and violations are imputed to the Defendants Sagecrest POA and Matthew E. Switzer, Trust, as at all times First Rate was acting as the agent for these Defendants.

77. The acts and omissions constituting such breaches and violations include, but are not limited to, the following:

- a. Failure to provide and/or maintain the apartment in a safe and sanitary condition fit for human habitation;
- b. Failure to provide and/or maintain the apartment's water heater, air handler, and heating system in a reasonably safe condition;
- c. Failure to perform a reasonable inspection of the apartment — including a reasonable inspection of the apartment's water heater, air handler, and ventilation system after determining the water heater was leaking carbon monoxide;
- d. Failure to test or confirm the carbon monoxide detectors were installed properly and working after delivering carbon monoxide detectors to Apartment 4624; and,
- e. Failure to adequately warn of the unreasonably dangerous condition in Apartment 4624.

78. PFC Forbush died and Breanna Halowell suffered severe and permanent injuries as a direct and proximate result of the negligence, and otherwise wrongful acts and omissions of Defendants First Rate and Drost.

79. Travis Forbush, Gretchen Hymas, and Breanna Halowell are therefore entitled to recover damages for personal injury and wrongful death in amounts to be proven at trial.

80. Defendant First Rate is vicariously liable for the negligence and/or recklessness of its President Drost.

**VIII. FOURTH CAUSE OF ACTION — PLAINTIFFS TRAVIS FORBUSH, GRETCHEN HYMAS, AND BREANNA HALOWELL
— STRICT PRODUCT LIABILITY — DANGEROUS AND DEFECTIVE PRODUCT — WATER HEATER —
DEFENDANT A.O. SMITH**

81. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

82. A.O. Smith, as the designer and manufacturer of the water heater, owed a duty to design and manufacture its water heaters to avoid the unreasonable risk of foreseeable injury to persons using the product with ordinary care. This duty includes providing adequate warnings or instructions if A.O. Smith knew or reasonably anticipated anyone would alter or modify its water heaters in any manner, including the removal of a safety device.

83. The water heater installed in Apartment 4624 was dangerous and defective when it left the hands of A.O. Smith, or became so when altered or modified in 2009 by Defendant Anfinson Plumbing.

84. The A.O. Smith water heater installed in Apartment 4624 is a sealed combustion chamber model. The design provides ambient air for combustion to the combustion chamber through a round opening called a flame arrestor in the very bottom of the water heater. The flame arrestor is nearly impossible to access to clean when the water heater is installed with and placed in the requisite drain pan.

85. A.O. Smith is aware of the propensity of its flame arrestors to clog, especially when the water heater is installed near a dryer. When the flame arrestor clogs, there is not

enough fresh air for proper combustion, and the water heater creates toxic levels of carbon monoxide to such a degree that the exhaust system is overwhelmed and carbon monoxide flows out of the top of the water heater and into the living space.

86. If the removal of the burner assembly and replacement of the thermocouple in the water heater in Apartment 4624 constitutes an "alteration or modification" as defined in I.C. § 6-1405(4), then replacing a thermocouple without a thermal cut off ("TCO") was reasonably anticipated conduct. The water heater was defective because A.O. Smith failed to provide adequate warnings or instructions with respect to changing or replacing thermocouples in this model of water heater.

87. As a direct and proximate result of the defective and dangerous condition of the water heater, it produced toxic levels of carbon monoxide that leaked into the living area of Apartment 4624, killing PFC McQuen Forbush and severely injuring Breanna Halowell.

88. Travis Forbush, Gretchen Hymas, and Breanna Halowell are therefore entitled to recover damages for personal injury and wrongful death in amounts to be proven at trial.

**IX. FIFTH CAUSE OF ACTION — PLAINTIFFS TRAVIS FORBUSH, GRETCHEN HYMAS, AND
BREANNA HALOWELL
— STRICT PRODUCT LIABILITY — FAILURE TO WARN — WATER HEATER —
DEFENDANT A.O. SMITH**

89. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

90. A.O. Smith, as the designer and manufacturer of the water heater, owes a duty to provide adequate warning to avoid the unreasonable risk of foreseeable injury to persons using the product with ordinary care. This duty includes providing adequate warnings or instructions if A.O. Smith knew or reasonably anticipated anyone would alter or modify its water heaters in any manner, including the removal of a safety device.

91. A.O. Smith failed to provide adequate warnings that the installation of this gas-fired water heater in a closet and in close proximity to a dryer would likely result in its flame arrestor clogging, resulting in poor and inadequate combustion, and dangerous carbon monoxide production.

92. If the removal of the burner assembly and replacement of the thermocouple in the water heater in Apartment 4624 constitutes an "alteration or modification" as defined in I.C. § 6-1405(4) then replacing a thermocouple without a thermal cut off ("TCO") was reasonably anticipated conduct. The water heater was defective because A.O. Smith failed to provide adequate warnings or instructions with respect to changing or replacing thermocouples in this model of water heater.

93. As a direct and proximate result of A.O. Smith's failure to warn, the occupants of the apartment on November 10, 2012, PFC Forbush and Breanna Halowell, had no knowledge that the water heater could produce toxic levels of carbon monoxide that could leak into the living area of Apartment 4624 and cause death and severe injuries.

94. Travis Forbush, Gretchen Hymas, and Breanna Halowell are therefore entitled to recover damages for personal injury and wrongful death in amounts to be proven at trial.

**X. SIXTH CAUSE OF ACTION — PLAINTIFFS TRAVIS FORBUSH, GRETCHEN HYMAS, AND
BREANNA HALOWELL
— NEGLIGENCE — DANGEROUS AND DEFECTIVE PRODUCT — WATER HEATER —
DEFENDANT A.O. SMITH**

95. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

96. A.O. Smith, as the designer and manufacturer of the water heater, owed a duty to design and manufacture its water heater to avoid the unreasonable risk of foreseeable injury to persons using the product with ordinary care.

97. The water heater installed in Apartment 4624 was dangerous and defective when it left the hands of A.O. Smith, or became so when altered or modified in 2009 by Defendant Anfinson plumbing.

98. The A.O. Smith water heater installed in Apartment 4624 is a sealed combustion chamber model. The design provides ambient air for combustion to the combustion chamber through a round opening called a flame arrestor in the very bottom of the water heater. The flame arrestor is nearly impossible to access to clean when the water heater is installed with and placed in the requisite drain pan.

99. A.O. Smith is aware of the propensity of its flame arrestors in its water heaters to clog, especially when the water heater is installed near a dryer. When the flame arrestor clogs, there is not enough fresh air for proper combustion, and the water heater creates toxic levels of carbon monoxide to such a degree that the exhaust system is overwhelmed and carbon monoxide flows out of the top of the water heater and into the living space.

100. A.O. Smith breached its duty to all foreseeable users, including PFC Forbush and Breanna Halowell, by manufacturing and delivering a dangerous and defective product.

101. If the removal of the burner assembly and replacement of the thermocouple in the water heater in Apartment 4624 constitutes an "alteration or modification" as defined in I.C. § 6-1405(4), then replacing a thermocouple without a thermal cut off ("TCO") was reasonably anticipated conduct. The water heater was defective because A.O. Smith failed to provide

adequate warnings or instructions with respect to changing or replacing thermocouples in this model of water heater.

102. As a direct and proximate result of the defective and dangerous condition of the water heater, resulting from A.O. Smith's negligence, the water heater produced toxic levels of carbon monoxide that leaked into the living area of Apartment 4624 and caused the death of PFC McQuen Forbush and severe injuries to Breanna Halowell.

103. Travis Forbush, Gretchen Hymas, and Breanna Halowell are therefore entitled to recover damages for personal injury and wrongful death in amounts to be proven at trial.

**XI. SEVENTH CAUSE OF ACTION — PLAINTIFFS TRAVIS FORBUSH, GRETCHEN HYMAS, AND
BREANNA HALOWELL
— NEGLIGENCE — FAILURE TO WARN — WATER HEATER —
DEFENDANT A.O. SMITH**

104. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

105. A.O. Smith, as the designer and manufacturer of the water heater, owed a duty to provide adequate warnings to avoid the unreasonable risk of foreseeable injury to persons using the product with ordinary care. This duty includes providing adequate warnings or instructions if A.O. Smith knew or reasonably anticipated anyone would alter or modify its water heaters in any manner, including the removal of a safety device.

106. A.O. Smith breached its duty when it failed to provide adequate warnings that the installation of this gas-fired water heater in apartment closets collocated with a dryer and with no direct source of outside air for combustion, would likely result in its flame arrestor clogging, resulting in poor and inadequate combustion and dangerous carbon monoxide production.

107. If the removal of the burner assembly and replacement of the thermocouple in the water heater in Apartment 4624 constitutes an "alteration or modification" as defined in I.C. § 6-

1405(4), then replacing a thermocouple without a thermal cut off ("TCO") was reasonably anticipated conduct. The water heater was defective because A.O. Smith failed to provide adequate warnings or instructions with respect to changing or replacing thermocouples in this model of water heater.

108. As a direct and proximate result of A.O. Smith's breach of its duty to warn, the occupants of the apartment on November 10, 2012, PFC Forbush and Breanna Halowell, had no knowledge that the water heater could produce toxic levels of carbon monoxide that could leak into the living area of Apartment 4624 and cause death and severe injuries.

109. Travis Forbush, Gretchen Hymas, and Breanna Halowell are therefore entitled to recover damages for personal injury and wrongful death in amounts to be proven at trial.

**XII. EIGHTH CAUSE OF ACTION - PLAINTIFF BREANNA HALOWELL
- INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS -
DEFENDANTS - SAGECREST POA, JON KALSBECK, FIRST RATE, TONY DROST, MATTHEW E.
SWITZER, TRUST, AND MATTHEW E. SWITZER**

110. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

111. The Defendants Sagecrest POA, Jon Kalsbeck, First Rate Property Management, Inc., Tony Drost, Matthew E. Switzer, Trust, and Matthew E. Switzer all had knowledge as early as the first months of 2012 that many of the water heaters installed in the Sagecrest Apartment Complex, including the water heater in Apartment 4624, were leaking carbon monoxide into the living areas of these apartments.

112. Notwithstanding this knowledge, these Defendants took no reasonable or appropriate action to protect the tenants of Sagecrest, many of whom were small children.

113. The Defendants' conduct under the circumstances where they were fully aware of the hazards and danger was reckless, extreme, and outrageous.

114. As a result of the defendants' negligent and reckless acts and omissions, McQuen Forbush died, and Breanna Halowell was seriously injured.

115. Halowell suffered severe emotional distress as a direct and proximate result of the conduct of these Defendants, and as a result of PFC Forbush's death.

**XIII. NINTH CAUSE OF ACTION - PLAINTIFFS TRAVIS FORBUSH, GRETCHEN HYMAS, AND
BREANNA HALOWELL**

-NEGLIGENCE -

DEFENDANT ANFINSON PLUMBING AND DEFENDANT DANIEL BAKKEN

116. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

117. Defendant Anfinson Plumbing, and its employee, Defendant Daniel Bakken, owed a duty to exercise reasonable care under the circumstances to all tenants and guests of Apartment 4624, including PFC Forbush and Breanna Halowell, when these defendants attempted to repair the water heater on or about April 27, 2009.

118. Defendant Anfinson Plumbing, by and through its employee Defendant Daniel Bakken, breached their duty to exercise reasonable care under the circumstances when they replaced the thermocouple in the A.O. Smith water heater in Apartment 4624, without also replacing the factory installed "TCO," which is a factory installed safety feature that shuts off the flow of gas to the burner when the combustion chamber gets too hot. Had a TCO remained in place, it would have reduced or prevented Plaintiffs' injuries and damages.

119. McQuen Forbush died and Breanna Halowell suffered severe and possibly permanent injuries as a direct and proximate result of the negligent acts and omissions of Defendant Anfinson Plumbing and its employee Defendant Daniel Bakken.

120. Travis Forbush, Gretchen Hyman, and Breanna Halowell are therefore entitled to recover damages for personal injury and wrongful death in amounts to be proven at trial.

**XIV. TENTH CAUSE OF ACTION - PLAINTIFFS TRAVIS FORBUSH, GRETCHEN HYMAS, AND
BREANNA HALOWELL**

-NEGLIGENCE-

DEFENDANTS MATTHEW E. SWITZER, TRUST, AND MATTHEW E. SWITZER

121. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

122. Defendants Matthew E. Switzer, Trust, and Matthew E. Switzer, as the owner of Building 46 at the Sagecrest Apartments, owed the tenants and guests a nondelegable duty to provide a safe and habitable living environment.

123. Defendants Matthew E. Switzer, Trust, and Matthew E. Switzer failed to act reasonably under the circumstances — either directly or through their agents and/or independent contractors — to provide a safe and habitable Apartment, breaching their duty to Plaintiffs.

124. The unsafe condition of the Apartment caused PFC Forbush's death and Breanna Halowell to suffer severe and possibly permanent injuries, as a direct and proximate result of the negligent acts and omissions of Defendants Switzer and Switzer Family Trust.

125. Travis Forbush, Gretchen Hymas, and Breanna Halowell are therefore entitled to recover damages for personal injury and wrongful death in amounts to be proven at trial.

XV. ELEVENTH CAUSE OF ACTION - PLAINTIFF BREANNA HALOWELL

-NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS-

ALL DEFENDANTS

126. Plaintiffs incorporate and adopt by reference all the facts and allegations above as though fully set forth herein.

127. Defendants owed Breanna Halowell a duty to act reasonably under the circumstances.

128. As described above, Defendants breached their respective duties, thereby causing PFC Forbush's death.

129. Halowell suffered severe emotional damage as a result of defendants' negligent conduct, which caused PFC Forbush's death.

130. Breanna Halowell witnessed PFC Forbush's dead body lying on the floor in the apartment. Witnessing PFC Forbush's dead body caused Breanna Halowell severe emotional harm.

131. Breanna Halowell has suffered physical manifestations of her emotional injuries, including but not limited to sleeplessness, nightmares, stomachaches, depression, and anxiety.

132. Breanna Halowell is entitled to recover damages for her injuries in amounts to be proven at trial.

XVI. RESERVATION OF RIGHT – PUNITIVE DAMAGES

133. Plaintiffs reserve the right to move to amend their pleadings according to I.C. § 6-1604 to include claims for punitive damages against all Defendants.

XVII. DEMAND FOR JURY TRIAL

134. Plaintiffs hereby request a trial by jury on all contested issues in this case.

XVIII. REQUEST FOR ATTORNEY FEES

135. Plaintiffs hereby request an award of attorney fees according to I.C. § 12-121.

PRAYER FOR RELIEF – PLAINTIFFS TRAVIS FORBUSH AND GRETCHEN HYMAS

WHEREFORE, the Plaintiffs Travis Forbush and Gretchen Hymas pray for judgment against the Defendants as follows:

1. For Judgment against Defendants Sagecrest POA, Jon Kalsbeek, Jay Arla, Chris Schwab, David Meisner, First Rate, Tony Drost, Matthew E. Switzer, Trust, and Matthew E. Switzer, jointly and severally, for damages for wrongful death in an amount of not less than \$10,000.00;
2. For Judgment against Defendant A.O. Smith for damages for wrongful death in an amount of not less than \$10,000.00;
3. For Judgment against Defendants Anfinson Plumbing, and Daniel Bakken, for damages for wrongful death in an amount of not less than \$10,000.00;
4. For Judgment requiring the Defendants to pay attorney fees and litigation costs to the Plaintiffs of not less than \$5,000.00 in the event default is obtained and default judgment is entered, and the actual amount of attorney fees and litigation costs the Plaintiffs incur if this matter is contested; and,
5. For such other relief the Court determines is appropriate and proper under the circumstances.

PRAYER FOR RELIEF – PLAINTIFF HALOWELL

WHEREFORE, the Plaintiff Halowell prays for judgment against the Defendants as follows:

1. For Judgment against Defendants Sagecrest POA, Jon Kalsbeek, Jay Arla, Chris Schwab, David Meisner, First Rate, Tony Drost, Matthew E. Switzer, Trust, and Matthew E. Switzer, jointly and severally, for specific and general damages for personal injury in an amount of not less than \$10,000.00;
2. For a judgment against Defendants Sagecrest POA, Jon Kalsbeek, First Rate, Tony Drost, Matthew E. Switzer, Trust, and Matthew E. Switzer for intentional infliction of emotional distress in an amount of not less than \$10,000;

3. For Judgment against Defendant A.O. Smith for damages for specific and general damages for personal injury in an amount of not less than \$10,000.00;
4. For Judgment against Defendants Anfinson Plumbing, and Daniel Bakken, for damages for personal injuries in an amount of not less than \$10,000.00;
5. For Judgment requiring the Defendants to pay attorney fees and litigation costs to the Plaintiffs of not less than \$5,000.00 in the event default is obtained and default judgment is entered, and the actual amount of attorney fees and litigation costs the Plaintiff incurs if this matter is contested; and,
6. For such other relief the Court determines is appropriate and proper under the circumstances.

DATED this 20th day of October, 2014.



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TYSON E. LOGAN
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ~~28~~²⁹th day of October, 2014, I served the foregoing, by having a true and complete copy delivered via facsimile or e-mail transmission to:

James D. LaRue, jdl@elamburke.com Matthew Walters, mlw@elamburke.com ELAM & BURKE, PA <i>For A.O. Smith</i>	Mark Tripp, tripp.mark@bradshawlaw.com Jason C. Palmer, palmer.jason@bradshawlaw.com BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C. <i>For A.O. Smith</i>
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Michael Haman, mlhaman.law@gmail.com HAMAN LAW OFFICE <i>For Mathew E. Switzer and the Mathew E. Switzer Trust</i>	Robert Anderson, raanderson@ajhlaw.com Robert A. Mills, rmills@ajhlaw.com ANDERSON, JULIAN & HULL LLP <i>For First Rate Property Management & Drost</i>
M. Michael Sasser mms@sasseringlis.com Clay Shockley, cms@sasseringlis.com SASSER & INGLIS, P.C. <i>For Daniel Bakken</i>	William A. Fuhrman, bfuhrman@idalaw.com Christopher Graham, cgraham@idalaw.com JONES GLEDHILL FUHRMAN GOURLEY, P.A. <i>For Anfinson Plumbing and Daniel Bakken</i>


Tyson E. Logan
THE SPENCE LAW FIRM, LLC

ORIGINAL

FILED
P.M.

1:30

NOV 07 2014

CHRISTOPHER D. RICH, Clerk
By PATRICK McLAUGHLIN
DEPUTY

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Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, d/b/a SAGECREST MULTI
FAMILY PROPERTY OWNERS"
ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

**DEFENDANT SAGECREST MULTI-
FAMILY PROPERTY OWNERS'
ASSOCIATION, INC.'S ANSWER TO
PLAINTIFFS' FOURTH AMENDED
COMPLAINT**

COMES NOW Defendant, Sagecrest Multi-Family Property Owners' Association, Inc.,
by and through its attorneys of record, Moore & Elia, LLP, and in response to Plaintiffs' Fourth
Fourth Amended Complaint and Demand for Jury Trial on file herein, admits, denies and alleges
as follows.

FIRST DEFENSE

This Defendant denies all allegations in Plaintiffs' Fourth Amended Complaint not
specifically admitted herein.

SECOND DEFENSE

That Plaintiffs' Fourth Amended Complaint fails to state a claim against this Defendant upon which relief can be granted.

THIRD DEFENSE

I. INTRODUCTION

1. As to the allegations of Paragraph 1 of Plaintiff's Fourth Amended Complaint, this Defendant admits that McQuen Forbush died while at the Sagecrest Apartment Complex in Meridian, Idaho on November 10, 2012. This Defendant lacks sufficient information or knowledge to admit or deny the remaining allegations contained in Paragraph 1 and therefore deny them.

II. PARTIES

2. and 3. As to the allegations of Paragraphs 2 and 3, this Defendant lacks sufficient information or knowledge to admit or deny these allegations and therefore deny them.

4. As to the allegations of Paragraph 4, this Defendant admits these allegations.

5. As to the allegations of Paragraph 5, this Defendant admits that Jon Kalsbeek was the President of Sagecrest Multi Family Property Owners' Association, Inc. This Defendant denies the remaining allegations of Paragraph 5.

6. As to the allegations of Paragraph 6, this Defendant admits that Jay Arla was the Vice-President of Sagecrest Multi Family Property Owners' Association, Inc. and resides in San Antonio, Texas. This Defendant denies the remaining allegations of Paragraph 6.

7. As to the allegations of Paragraph 7, this Defendant admits that Christopher Schwab was the Secretary of Sagecrest Multi Family Property Owners' Association, Inc. and resides in Cupertino, CA. This Defendant denies the remaining allegations of Paragraph 7.

8. As to the allegations of Paragraph 8, this Defendant admits that David Meisner was the Treasurer of Sagecrest Multi Family Property Owners' Association, Inc. and resides in Meridian, Idaho. This Defendant denies the remaining allegations of Paragraph 8.

9. As to the allegations of Paragraph 9, this Defendant admits that Sagecrest Multi-Family Property Owners Association, Inc. had a contract with First Rate Property Management, Inc. to provide property management services in existence on November 10, 2012. This Defendant is without sufficient information to admit or deny the remaining allegations and therefore denies them.

10. through 19. As to the allegations of Paragraphs 10, 11, 12, 13, and 19, this Defendant lacks sufficient information or knowledge to admit or deny these allegations and therefore denies them.

III. JURISDICTION & VENUE

22. through 24. As to the allegations of Paragraphs 22, 23 and 24, this Defendant admits that venue is proper in Ada County, Idaho. This Defendant is without sufficient information to admit or deny the remaining allegations and therefore denies them.

IV. FACTS COMMON TO ALL CAUSES OF ACTION

25. As to the allegations in Paragraph 25, this Defendant lacks sufficient information or knowledge to admit or deny these allegations and therefore denies them.

26. Defendant admits the allegations of Paragraph 26.

27. As to the allegations in Paragraph 27, this Defendant admits that the Ada County Coroner's report speaks for itself but this Defendant lacks sufficient information or knowledge upon which to admit or deny the remaining allegations and therefore denies them.

28. As to the allegations in Paragraph 28, this Defendant admits that the Sagecrest Apartment complex includes 48 separate buildings, each with four apartments, and that the separate buildings are owned by individuals or entities and that each owner is a member of the Sagecrest Multi Family Property Owners' Association, Inc. This Defendant further admits that Sagecrest Multi Family Property Owners' Association, Inc. contracted with First Rate Property Management, Inc. to be the managing agent of the Association. Upon information and belief, First Rate Property Management, Inc. had a separate agreement with the owner of Building 46 to manage the premises. This Defendant lacks sufficient information or knowledge upon which to admit or deny the remaining allegations and therefore denies them.

29. and 30. As for the allegations in Paragraphs 29 and 30, this Defendant lacks sufficient information or knowledge to admit or deny these allegations and therefore denies them.

31. As for the allegations in Paragraph 31, this Defendant admits that Sagecrest Multi Family Property Owners' Association, Inc. contracted with First Rate Property Management Inc. to provide management services for the common area. This Defendant further admits that First Rate Property Management, Inc. contracted with the majority of the individual building owners separately for management and rental of the individual building units. Upon information and belief admit that First Rate Property Management Inc. was contracted with the owner of Building 46 individually. This Defendant lacks information and knowledge to admit or deny the remaining allegations and therefore denies them.

32. As for the allegations in Paragraph 32, This Defendant lack sufficient information or knowledge to admit or deny the allegations and therefore denies them.

33. As to the allegations in Paragraph 33, this Defendant lacks sufficient information or knowledge to admit or deny the allegations and therefore denies them.

34. and 35. As to the allegations in Paragraphs 34 and 35, this Defendant lacks sufficient information or knowledge to admit or deny the allegations and therefore denies them.

36. As for the allegations in Paragraph 36, this Defendant admits that carbon monoxide is colorless and odorless but lack sufficient information or knowledge to admit or deny the remaining allegations and therefore denies them.

37. through 41. As for the allegations in Paragraphs 37, 38, 39, 40, and 41, this Defendant lacks sufficient information or knowledge to admit or deny these allegations and therefore denies them.

42. This Defendant denies the allegations of Paragraph 42. Specifically, this Defendant denies the Sagecrest Multi Family Property Owners' Association, Inc. or its officers prohibited First Rate Property Management, Inc. from warning other tenants of potential dangers at Sagecrest. Defendant admits only that Exhibit 2 was sent from Sagecrest Multi Family Property Owners' Association, Inc. to First Rate Property Management, Inc., and admits the document speaks for itself.

43. As for the allegations in Paragraph 43, this Defendant lacks sufficient information or knowledge to admit or deny these allegations and therefore denies them.

44. This Defendant admits the allegations of Paragraph 44.

45. through 48. As for the allegations in Paragraphs 45, 46, 47, and 48, this Defendant lacks sufficient information or knowledge to admit or deny these allegations and therefore denies them.

49. As for the allegations in Paragraph 49, this Defendant admits the Sagecrest Board of Directors hired Engineering Consultants Incorporated to conduct a Water Heater Site Investigation at Sagecrest and admit the document speaks for itself. This defendant denies all other allegations in Paragraph 49.

50. through 52. As for the allegations in Paragraphs 50, 51, and 52, this Defendant lacks sufficient information or knowledge to admit or deny these allegations and therefore denies them.

53. This Defendant denies the allegations of Paragraph 53.

54. through 57. As for the allegations in Paragraphs 54, 55, 56, and 57, this Defendant lacks sufficient information or knowledge to admit or deny these allegations and therefore denies them.

V. FIRST CAUSE OF ACTION

NEGLIGENCE

DEFENDANT MATTHEW E. SWITZER, TRUST, AND MATTHEW E. SWITZER, TRUSTEE

58. through 64. As to the allegations in Paragraph 58, 59, 60, 61, 62, 63 and 64, no answer on behalf of this Defendant is required because this cause of action does not refer to it.

VI. SECOND CAUSE OF ACTION

NEGLIGENCE

DEFENDANTS SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC. ("SAGECREST POA"), AND ITS OFFICERS JON KALSBEK, JAY ARLA, CHRISTOPHER SCHWAB, DAVID MEISNER

65. As to the allegations in Paragraph 65, this Defendant restates its answer to Paragraphs 1 through 64 as fully set forth herein.

65. through 71. This Defendant denies the allegations of Paragraphs 65, 66, 67, 68, 69, 70, and 71.

VII. THIRD CAUSE OF ACTION
NEGLIGENCE
DEFENDANTS FIRST RATE PROPERTY MANAGEMENT, INC. AND TONY DROST

72. through 75. As to the allegations of Paragraphs 72 through 75, no answers on behalf of this Defendant are required because these causes of action do not refer to it.

76. As to the allegations of Paragraph 76, this Defendant denies that any breach or violation by First Rate is imputed to the Defendant Sagecrest POA.

77. through 80. As to the allegations of Paragraphs 77, 78, 79, and 80, no answers on behalf of this Defendant is required because these causes of action do not refer to it.

VIII. FOURTH CAUSE OF ACTION
STRICT PRODUCT LIABILITY-DANGEROUS AND DEFECTIVE PRODUCT –
WATER HEATER
DEFENDANT A. O. SMITH

81. through 88. As to the allegations of Paragraphs 81 through 88, no answers on behalf of this Defendant are required because these causes of action do not refer to it.

IX. FIFTH CAUSE OF ACTION
STRICT PRODUCT LIABILITY-DANGEROUS AND DEFECTIVE PRODUCT –
WATER HEATER
DEFENDANT A. O. SMITH

89. through 94. As to the allegations of Paragraphs 89 through 94, no answers on behalf of this Defendant are required because these causes of action do not refer to it.

X. SIXTH CAUSE OF ACTION
NEGLIGENCE-DANGEROUS AND DEFECTIVE PRODUCT – WATER HEATER
DEFENDANT A. O. SMITH

95. through 103. As to the allegations of Paragraphs 95 through 103, no answers on behalf of this Defendant are required because these causes of action do not refer to it.

XI. SEVENTH CAUSE OF ACTION
NEGLIGENCE-FAILURE TO WARN – WATER HEATER
DEFENDANT A. O. SMITH

104. through 109. As to the allegations of Paragraphs 104 through 109, no answers on behalf of this Defendant are required because these causes of action do not refer to it.

XVIII. FOURTEENTH CAUSE OF ACTION
INTENTIONAL INFLICTION OF EMOTIONAL HARM
DEFENDANTS SAGECREST MULTI FAMILY PROPERTY OWNERS’
ASSOCIATION, INC., JON KALSBEK, FIRST RATE PROPERTY MANAGEMENT,
INC., TONY DROST, MATTHEW E. SWITZER, TRUST, and MATHEW E. SWITZER

110. As to the allegations of Paragraph 110, this Defendant restates its answers to Paragraphs 1 through 109 as fully set forth herein.

111. through 115. This Defendant denies the allegations of Paragraphs 111, 112, 113, 114, and 115.

XIX. FIFTEENTH CAUSE OF ACTION
NEGLIGENCE
DEFEDANT ANFINSON PLUMBING AND DEFENDANT DANIEL BAKKEN

116. through 120. As to the allegations of Paragraphs 116 through 120, no answers on behalf of this Defendant is required because these causes of action do not refer to it.

XXIII. EIGHTEENTH CAUSE OF ACTION
NEGLIGENCE
DEFENDANTS MATTHEW E. SWITZER, TRUST, AND MATTHEW E. SWITZER

168. through 172. As to the allegations of Paragraphs 168 through 172, no answers on behalf of this Defendant are required because these causes of action do not refer to it.

XIX. NINETEENTH CAUSE OF ACTION
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
ALL DEFENDANTS

173. As to the allegations of Paragraph 173, this Defendant restates its answer to Paragraphs 1 through 172 as fully set forth herein.

174. through 179. This Defendant denies the allegations of Paragraphs 174, 175, 176, 177, 178, and 179.

XXV. RESERVATION OF RIGHTS – PUNITIVE DAMAGES

180. This Defendant denies the allegations of Paragraph 127.

PRAYER FOR RELIEF – PLAINTIFFS FORBUSH AND HYMAS

This Defendant denies the allegations of Paragraphs 1 through 6 in the prayers for relief of Plaintiff Forbush and Hymas.

PRAYER FOR RELIEF – PLAINTIFF HALOWELL

This Defendant denies the allegations of Paragraphs 1 through 6 in the prayer for relief of Plaintiff Halowell.

AFFIRMATIVE DEFENSES

That at the time of the filing of this Answer, this Defendant has not been able to fully engage in discovery and lacks information or knowledge sufficient to form a belief as to all of those affirmative defenses that might apply in this case. At this time, pursuant to Rule 12 of the Idaho Rules of Civil Procedure, this Defendant asserts the following affirmative defenses so that the same are not waived.

FIRST AFFIRMATIVE DEFENSE

That this Defendant breached no duty owed to Plaintiffs.

SECOND AFFIRMATIVE DEFENSE

There exists no proximate causation and/or causation between any alleged act or alleged breach of duty or warranty by this answering Defendant and all or some of Plaintiffs' alleged damages.

THIRD AFFIRMATIVE DEFENSE

That Plaintiff Halowell and Plaintiff's decedent were guilty of negligence and careless misconduct, at the time of and in connection with the matters and damages alleged, which misconduct on their part proximately caused and contributed to said events and resultant damages, if any. The negligence of such Plaintiffs is imputed to all Plaintiffs.

FOURTH AFFIRMATIVE DEFENSE

The damages and injuries sustained by the Plaintiffs, if any, were proximately caused by the negligence or fault of parties, persons, or entities other than this answering Defendant whom Defendant does not control and over whom Defendant has no control. By asserting this defense, this answering Defendant does not admit that Plaintiffs have been damaged.

FIFTH AFFIRMATIVE DEFENSE

This answering Defendant alleges, on information and belief, that whatever damage, injury, loss or expense that may have been or will be incurred by the Plaintiffs under the circumstances and events alleged in the Fourth Amended Complaint, were the direct and legal result of intervening and superseding causes over which this answering Defendant has no control, and for which this Defendant is not responsible.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs are not the real parties in interest with respect to all or a part of their claim, contrary to Rule 17, Idaho Rules of Civil Procedure.

SEVENTH AFFIRMATIVE DEFENSE

That the Plaintiffs have failed to mitigate their damages, if any.

EIGHTH AFFIRMATIVE DEFENSE

To the extent Plaintiffs' claims sound in equity, Plaintiffs' claims are barred by the doctrine of unclean hands.

NINTH AFFIRMATIVE DEFENSE

To the extent that Plaintiffs have been compensated by collateral sources as provided for in I.C. § 6-1606, any award issued in this case should be reduced by the same.

TENTH AFFIRMATIVE DEFENSE

To the extent that there was any prepayment of claims as provided for in I.C. § 41-1840, this answering Defendant is entitled to credit for the same.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs have waived, or by their conduct are estopped from asserting, the causes of action contained in the Fourth Amended Complaint.

TWELFTH AFFIRMATIVE DEFENSE

That this Defendant's officers are immune from liability as to all or a portion of the claims set forth in Plaintiffs' Fourth Amended Complaint pursuant to Idaho Code §6-1605.

THIRTEENTH AFFIRMATIVE DEFENSE

That this Defendant's liability is limited or barred because it discharged its duties in compliance with the Idaho Nonprofit Corporation Act, Idaho Code §30-3-65.

FOURTEENTH AFFIRMATIVE DEFENSE

The negligence or acts of other Defendants to this action are not imputed to these answering Defendants.

FIFTEENTH AFFIRMATIVE DEFENSE

This Defendant has not conducted full discovery in this action, and therefore, expressly reserves the right to amend this answer and to add additional or supplemental defenses, or to file and serve other responsive pleadings, allegations or claims.

REQUEST FOR ATTORNEY'S FEES

That as a result of the filing of this action, this Defendant has retained the firm of Moore & Elia, LLP in defense of this matter and request that it be granted reasonable attorney's fees pursuant to Idaho Code §§ 12-120, 12-121, and/or Idaho Rule of Civil Procedure 54(e), or other applicable rules and/or law.

WHEREFORE, Defendant Sagecrest Multi-Family Property Owners' Association, Inc., pray for judgment against Plaintiffs as follows:

1. That Plaintiffs take nothing by this Fourth Amended Complaint;
2. That the Fourth Amended Complaint in this matter be dismissed with prejudice;
3. That the Defendant Sagecrest Multi-Family Property Owners' Association, Inc., be awarded costs expended in this matter;
4. That the Defendant Sagecrest Multi-Family Property Owners' Association, Inc., be awarded attorney fees pursuant to the Idaho Rules of Civil Procedure and the statutes of the State of Idaho including I.C. §12-120 and §12-121.
5. For such other and further relief as the court may deem just.


DEMAND FOR JURY TRIAL

The Defendant Sagecrest Multi-Family Property Owners' Association, Inc., demand a trial by jury on Plaintiff Travis Forbush and Gretchen Hymas, and Breanna Halowell's Fourth Amended Complaint, composed of no less than twelve (12) persons, on all issues, claims and

defenses so triable, pursuant to the constitutions and laws of the United States and the State of Idaho.

DATED this 7th day of November, 2014.

MOORE & ELIA, LLP

By: 
Michael J. Elia, Attorneys for Defendant
Sagecrest Multi-Family Property Owners'
Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2014, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

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Michael J. Elia

Copsey - Beth
11/13/2014
SM

NO. 10.30
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RECEIVED
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Ada County Clerk

NOV 14 2014

CHRISTOPHER D. RICH, Clerk
By BETH MASTERS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., et al,

Defendants.

Case No. CV-PI-1304325

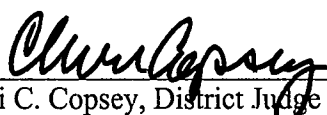
~~[PROPOSED]~~ ORDER DENYING
DEFENDANT SAGECREST MULTI-
FAMILY PORPERTY OWNERS'
ASSOCIATION, INC.'S MOTION FOR
SUMMARY JUDGMENT

On July 24, 2014, the Sagecrest Multi-Family Property Owners Association ("the POA") moved for summary judgment. The Court reviewed the POA's Motion and supporting Memorandum, the Plaintiffs' Response, First Rate Property Management's ("FRPM") Response, and the POA's Reply. The Court also heard oral argument from the POA and Plaintiffs on October 30, 2014.

The Court finds genuine issues of material fact remain regarding whether the POA had a duty to perform repairs or maintenance on the unit interiors at the Sagecrest Apartments and whether the POA assumed any duty to the Plaintiffs, either directly or through FRPM. For these reasons, the POA's Motion is DENIED.

IT IS SO ORDERED.

13-
DATED this day of November, 2014.


Cheri C. Copsey, District Judge

[PROPOSED] ORDER DENYING POA SUMMARY JUDGMENT
CASE NO. CV-PI-2013-04325

000642

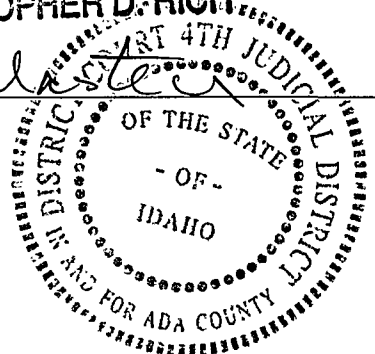
CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of November, 2014, I caused a true and correct copy of the foregoing to be served via US Mail, postage prepaid, addressed to the following:

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CHRISTOPHER D. RICH
Barth A. Steen
Clerk of Court



The seal is circular with a dotted border. The text around the border reads "DISTRICT COURT OF THE STATE OF IDAHO" at the top and "IN AND FOR ADA COUNTY" at the bottom. In the center, it says "- OF -".

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Attorneys for Plaintiffs

NO. _____ FILED _____
 A.M. _____ P.M. *640*

NOV 20 2014

CHRISTOPHER D. RICH, Clerk
 By JAMIE MARTIN
 DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO,
 IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN
 HYMAS, individually and as the natural parents
 of PRIVATE FIRST CLASS MCQUEN C.
 FORBUSH, USMC (Deceased), and
 BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
 PROPERTY OWNERS' ASSOCIATION *et*
al.,

Defendants.

Case No. CV PI 1304325

**PLAINTIFFS' RESPONSE IN OPPOSITION
 TO DEFENDANTS KALSBECK, ARLA,
 SCHWAB, AND MEISNER'S MOTION FOR
 SUMMARY JUDGMENT**

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS KALSBECK, ARLA, SCHWAB, AND
 MEISNER'S MOTION FOR SUMMARY JUDGMENT — 1**

000645

I. SUMMARY

Defendant Jon Kalsbeek¹ has moved for summary judgment on the grounds that: (1) he supposedly owed no duties to Plaintiffs; (2) he supposedly is entitled to an affirmative defense of immunity under I.C. § 30-3-85, because he claims that all of his acts and omissions were in good faith and reasonably prudent; and (3) his conduct supposedly was not sufficiently extreme and outrageous to sustain a claim for Intentional Infliction of Emotional Distress (“IIED”). Mr. Kalsbeek fails to show that he is entitled to judgment as a matter of law on any of these issues.

The record is laden with facts conflicting Mr. Kalsbeek’s arguments. It is for the jury to determine the existence and scope of Mr. Kalsbeek’s affirmative undertaking to address the threat of CO poisoning at the Sagecrest Apartments. It is also for the jury to decide whether to credit Mr. Kalsbeek’s self-serving protestation that he acted prudently and in good faith, or whether to infer from the evidence that Mr. Kalsbeek acted imprudently or in bad faith. Finally, a reasonable jury could easily find that Mr. Kalsbeek’s conduct was more extreme and outrageous than demonstrated in other IIED cases recognizing valid IIED claims.²

II. FACTS

A. **Mr. Kalsbeek was aware - for over a year prior to the deadly poisoning at issue here - of warnings that people at the Sagecrest Apartments faced an imminent risk of death due to carbon monoxide (CO).**

In his Affidavit and Memorandum, Mr. Kalsbeek discusses only a single, comparatively minor incident (that one of the units that he owned had tested at 19 ppm CO), which placed him on notice of the CO threat at the Sagecrest Apartments. (Kalsbeek Aff. ¶¶ 4-5; Defs’ Memo. at 4.) In fact, Mr. Kalsbeek was clearly aware of a **litany of serious warnings** stretching back to at least the summer of 2011.

In July of 2011 — sent *over sixteen months prior to the deadly poisoning* — First Rate employee Tara Gaertner called Mr. Kalsbeek and informed him of a CO emission at the

¹ Plaintiffs do not oppose the Motion with respect to Jay Arla, Christopher Schwab, and David Meisner, who are hereby dismissed.

² Mr. Kalsbeek’s brief is largely a mash-up of prior briefing. Significant portions are redundant with the *Motion to Dismiss Negligence Claim* filed on June 12, 2014. The Court did not rule on that Motion, but gave Mr. Kalsbeek the opportunity to brief separate issues of immunity that he did not raise in his initial *Motion*. The entire Part “B” of the instant *Motion* appears to be copied substantially verbatim from the *Motion to Dismiss Intentional Infliction of Emotional Harm Claim* filed July 28th, 2014. Plaintiffs hereby incorporate by reference their July 3, 2014, and October 17, 2014 Responses.

Sagecrest Apartments that almost became deadly. (Ex. 1, FR1421-22 (discussing phone call to Mr. Kalsbeek).) During this event, tenants were exposed to such a high level that, had they remained in the apartment for only another forty-five minutes *they would have died*. (*Id.* at FR1421 (“If the tenants had been in there for 45 more minutes they would have died.”).) At this time, Ms. Gaertner expressed her unequivocal conclusion that the only solution was to replace all of the defective A.O. Smith water heaters at Sagecrest. (*Id.*)

An email from Mr. Kalsbeek also reveals that, by July of 2011 at the latest, he was well aware of the threat of carbon monoxide poisoning at the Sagecrest Apartments stemming from clogged filters on the A.O. Smith water heaters. (Ex. 2, SPOA896-99, at 897.) A few days later, Sheila Thomason, the Maintenance Director from First Rate, sent out a dire warning email — which Mr. Kalsbeek acknowledged reading (Ex. 3, Kalsbeek Dep. 69:22–70:23) — stating:

The water heaters listed at your properties are allowing carbon monoxide into the apartments at dangerous levels that potentially could cause death to your tenants. . . . Intermountain Gas has been out to the complex on numerous occasions and shut the service off to several apartments within the last 2 years. The last unit had over 4,000 ppm of carbon monoxide in the unit. Intermountain Gas told us and **the tenants they could have died if they were in the apartment much longer. This was very alarming to all of us especially since this could be happening in any of the units.**

(Ex. 4, FR7098-7101, at 7098 (emphasis added).) Also in July of 2011, Ms. Thomason forwarded to Mr. Kalsbeek a letter from Ben Davis / Express Plumbing, who had inspected the Sagecrest units. (Ex. 5, SPOA2370-73, at 2372 (“I have also attached a word doc I received from Ben”); Ex. 6, SPOA2374-75.) The letter warned of an imminent threat to tenant and guest safety:

These water heaters are producing carbon monoxide levels comparable to the average car producing 2100 parts per million (ppm) of carbon monoxide in a closed room. At these levels of carbon monoxide, you would experience headache, dizziness and nausea within 5-10 minutes preceding death within 30 minutes. An average new water heater will safely produce 10 PPM of carbon monoxide, at a safe healthy level. **The water heaters at Sagecrest with a clogged filter and a combustion chamber that is damaged are producing 2000 to 3000 PPM of carbon monoxide through the exhaust vent. This is a serious health problem**. Combined with a clogged filter and a room occupied by a dryer that also consumes air, the water heaters are working twice as hard to obtain air, causing more maintenance and damage than normal wear and tear. Not to mention the carbon monoxide being emitted into the apartment because as the dryer is pulling air from the exhaust vent for the water heater, it is eliminating the carbon monoxide to properly be pushed out through the exhaust vent. Instead the carbon

monoxide is being emitted directly into the apartment, at potentially deadly levels of over 2000 PPM. The maximum allowable concentration for a continuous exposure to carbon monoxide in an eight hour period is 50 ppm. At Sagecrest **some apartments were tested resulting in levels forty times higher than the maximum allowable concentration for continuous exposure to carbon monoxide. I would strongly recommend that these issues be solved before any tenants suffer health problems or death.**

(*Id.*)

Thus, long in advance of the deadly poisoning at issue here, Mr. Kalsbeek was aware of “a serious potential health problem with carbon monoxide issues” at the Sagecrest Apartments. (Ex. 3, Kalsbeek Dep. 219:10-15.) He was also aware of the solutions: to replace all of the defective A.O. Smith water heaters and to install hard-wired CO detectors in every unit. In his own words: “[t]he fix is to replace the problem units with a new design water heater” (*see* Ex. 3 to the Dec. of E. Clark in Opp. to SPOA MSJ, FR444) and “an AC/DC detector permanently installed is the best solution for CO2 [*sic*] Detectors” (*see* Ex. 4 to the Dec. of E. Clark in Opp. to SPOA MSJ, FR1672-73.) Mr. Kalsbeek took charge of the response to the CO issue at Sagecrest, by virtually all accounts, but he dangerously and unreasonably failed to do the basic minimum things he recognized were critical to make the property safe: Apartment 4624 did not get a new water heater, or a hard-wired CO detector, prior to November 10, 2012.

Mr. Kalsbeek was aware of a specific, widespread, and ongoing threat to residents and guests at Sagecrest, including Apartment 4624. In October of 2012, Mr. Kalsbeek received a document (*see* Ex. 13 to the Dec. of E. Clark in Opp. to Switzer MSJ, FR5818-22) summarizing the numerous instances of elevated CO readings at the Sagecrest Apartments (Ex. 3, Kalsbeek Dep. 318:7-20). This document revealed a reading of **100 ppm CO at the very apartment in which McQuen Forbush was killed and Breanna Halowell was injured.** (*see* Ex. 13 to the Dec. of E. Clark in Opp. to Switzer MSJ, FR5818-22, at FR5821.)

Only one month before the poisoning that took McQuen Forbush’s life and seriously injured Breanna Halowell, Mr. Kalsbeek received an even more ominous warning of what was to come. On October 10, 2012, the Meridian Fire Department responded to a CO emergency involving Sagecrest tenant Molly Collins. The Fire Department warned First Rate that the CO detectors at Sagecrest were inadequate. The next day, First Rate employee Tara Gaertner emailed Mr. Kalsbeek, pleading:

After yesterdays [*sic*] events I would like to have Chris [handyman contractor] go into every unit and check and make sure the CO detectors that we installed are in

working condition. The units that do not have CO detectors I would like him to install one. Talking with the fire department yesterday they said that the detectors that we gave the tenants when this first happened is not enough to cover our end. He said the tenants may not have even put the batteries in and installed them properly. He said if they didnt [sic] then it would not be the tenants [sic] fault it would be our responsibility to make sure they are installed and working properly. He recommended installing the CO detectors that we have been installing in every unit. I would really like to do this to take the heat off us. I talked to Chris, he would charge \$25 per building to make sure they are all good. If there is a unit that needs a CO detector it would be \$55 for the detector and \$25 for installing it. Please let me know your thoughts.

(Ex. 7, SPOA2658-2670, at 2658.) At this point, there were hardwired detectors in only 64 of the 192 Sagecrest apartments. (*Id.*, at 2667-70.) Apartment 4624 — where McQuen Forbush and Breanna Halowell were poisoned only a month later — did not have a hard-wired detector (*Id.* at SPOA2669). Mr. Kalsbeek specifically considered the absence of hard-wired detectors in the majority of the Sagecrest Apartments, and he knew that installing the hard-wired detectors was necessary for safety, but decided against any immediate action to install the detectors in every unit to protect the tenants and their guests. (Ex. 3, Kalsbeek Dep., 332:20-336:16).

Mr. Kalsbeek discussed the issue with Mr. Drost, but determined that no special or urgent steps needed to be taken to ensure that CO detectors were hard-wired in each unit. (10-25-12 Meeting Tr., produced as SPOA2991, at 14:2-17:16 (Ex. 9 to E. Clark Dec. in Opp. To Drost MSJ). Kalsbeek stated to Tony Drost and Tara Gaertner, at their October 25, 2012 meeting,

The reading in here is 'Carbon monoxide detector combos are to eventually be installed in every unit by replacing the existing smoke detector currently in the hallway. CO monitors shall be changed out or replace existing smoke detectors in the hallway area during turnovers, preventative maintenance, lease renewals, or faulty smoke detectors until complete. Should a smoke detector fail in the bedroom, the existing unit in the hallway area shall be moved to the bedroom if operational and the new CO detector combo shall be installed in the hallway.

Id., at 14:2-13. After discussion with Drost, Kalsbeek recognized that the CO detector installation had been slower than he expected. “I—I—I just have a — a problem with a third of ‘em being changed and then having this issue come up.” (*Id.* at 15:18-20) Yet, remarkably, Kalsbeek determined: “*Yeah, I – I don’t see any problems as long as – as long as we’re following this* [referring to Kalsbeek’s previously implemented “CO procedures”]. *Id.*, at 17:15-16. Mr. Kalsbeek knowingly left the tenants and their guests in danger, having taken charge of

the CO response and demanding that others at the property follow his lead. His unreasonable decision-making ultimately was a cause of the November 10, 2012 CO poisoning.

B. Mr. Kalsbeek had the ability to take action with respect to unit interiors. He used his power to take charge of the response to the CO threat at Sagecrest.

Mr. Kalsbeek incorrectly asserts that “[o]wners of Sagecrest apartments or buildings have an express, exclusive responsibility to maintain the interiors of residential units they own.” (Defs’ Memo. at 3.) As described at length in *Plaintiffs’ Response in Opposition to Defendant Sagecrest Multi-Family Property Owners’ Association, Inc.’s Motion for Summary Judgment*, filed August 22nd, this is false. The POA and individual unit owners exercised joint control over unit interiors. The Board, in its sole discretion, had the right to enter units to conduct maintenance and repairs. (Resp. to POA MSJ at 4.)

Although First Rate warned some tenants at Sagecrest that there was a CO danger at Sagecrest and that all the water heaters would be replaced within a week, on March 9, 2012, Mr. Kalsbeek obstructed that responsive action. The same day that the notice was provided to the tenants (3/9/12 Notice to Tenants, MPD 000303, Ex. B to Aff. Of Robert A. Mills in Support of Drost MSJ), March 9, 2012, Mr. Kalsbeek intentionally ordered others to block information from getting to the owners and the tenants, almost immediately questioning whether the water heaters had to be replaced:

Tara, Please do not send this info out [water heater testing spreadsheet information] to owners or tenants, it is not relevant to the levels of CO in the flue, the info sent refers to the exposure levels in a room over a period of time and what symptoms would occur. . . . Please keep this issue in prospective for both owners and tenants, **we do not want a health hazard nor do we want to do replacements and increased costs for owners when not necessary.**

(Kalsbeek email, FR02319(emphasis added), Ex. 9 to Supplemental Aff. Of C. Stacey in Support of POA MSJ).

Tara Gaertner angrily responded on March 12, 2012, to Mr. Kalsbeek’s email, stating “*I am not going to go rounds on this with you.* I was here with a safety manager from Intermountain Gas and Ben with Express Plumbing when they trained me on what to do. I am to be testing in the flu and going off of that number and chart. Anything tested over 50 Intermountain Gas would red tag the water heater, shut it off and not turn it back on until it was either A) cleaned or B) replaced. . . . *I am not going to withhold important information from*

owners when it comes to their tenant's health. This is a very important issue that needs to be taken care of properly. (Gaertner email, Ex. 117, FR737-739, Ex. 17 to Dec. of E. Clark in Opposition to POA MSJ)(emphasis added). Just eight days later, Mr. Kalsbeek implemented his "CO Procedures" (CO Procedures, Ex. 11), and he emailed the POA Board of Directors the following day explaining that "On going testing and **procedures are being modified** to make sure tenants and owners are protected, we are being proactive." (Ex. 9, 3/20/12 Kalsbeek email)(emphasis added). The water heater in unit 4624 was never replaced, and Kipper was never told that the dangerous water heater was left in her apartment.

Mr. Kalsbeek — under his self-imposed role as micromanager-in-chief — asserted his right to control "global issues" ranging from dishwasher replacement to ceiling fan replacement. (*Id.* at 5-6.) Mr. Kalsbeek exercised control over: (1) an undertaking to pool resources to replace water heaters (*id.* at 6-7); (2) an undertaking to decide which professional service, if any, to hire to perform preventative maintenance on water heaters (*id.* at 7); (3) an undertaking to establish the procedures used to test for CO (*id.* at 8-10); (4) an undertaking to control the pace of hard-wired CO detector installation (*id.* at 10-11); and (5) an undertaking to control what information was provided to unit owners and tenants regarding the CO threat (*id.* at 11-12).

C. Ample evidence proves that Mr. Kalsbeek instituted the badly flawed CO testing procedures at Sagecrest. Mr. Kalsbeek's self-serving testimony to the contrary (disputing the First Rate employee testimony and his own contemporaneous statements to the contrary) amount to disputed issues of fact for the jury to resolve.

Mr. Kalsbeek unilaterally created the flawed CO testing procedures used at the Sagecrest apartment complex, and foisted them on FRPM's employees. (*See* Resp. to POA MSJ at 8-10.) Mr. Kalsbeek testifies to the contrary in his affidavit, suggesting that the procedures were developed with input from First Rate employees. (Kalsbeek Aff. ¶¶ 6-9; Defs' Memo. at 4-5.) At any rate, Mr. Kalsbeek's self-exculpatory affidavit is not particularly persuasive. In his Affidavit, Mr. Kalsbeek conceals and downplays his involvement by carefully using the passive voice: "Written carbon monoxide testing procedures were eventually developed and, to my understanding, were utilized by First Rate in testing for carbon monoxide at Sagecrest." (Kalsbeek Aff. ¶ 9 (emphasis added).) Mr. Kalsbeek was not nearly so sheepish about his role prior to the deadly poisoning. In fact, he made it quite clear to FRPM employee Tara Gaertner that HE was the driving force behind the new procedures:

[W]e traveled 1600 miles (800 each way) to correct the CO monitoring procedure that was being done incorrectly. Over the previous 6 months, how many water heater changes and unnecessary expense to owners was caused by water heaters being changed due to inaccurate readings, — will we ever know?”

(Ex. 8, FR2869-71 at FR2870 (emphasis added).) Mr. Kalsbeek took credit for authoring the CO testing procedures at the time. His current effort to distance himself from the testing procedures reflects poorly on his credibility, and it certainly does not prove the absence of any material fact for trial.

D. Mr. Kalsbeek's testing procedures grossly deviated from the sources that he supposedly relied on.

Mr. Kalsbeek claims to have relied on materials from Intermountain Gas and the internet when formulating his procedures. (Kalsbeek Aff. ¶ 7; Ex. 3, Kalsbeek Dep. 91:14-98:25; Ex 9, SPOA2443.) Mr. Kalsbeek has no training or experience in CO testing. (Ex. 3, Kalsbeek Dep. 18:17-23, 23:5-8, 24:7-10; 103:6-11.) Therefore, it was patently unreasonable for him to think that he could create his own procedures, without so much as consulting a qualified professional. Moreover, Mr. Kalsbeek's procedures grossly deviated from the sources that he supposedly relied on:

The Intermountain Gas Standard Operating Procedure. Mr. Kalsbeek supposedly relied on procedures provided by Intermountain Gas. (Ex. 10, SPOA2484-85.) Notably, these procedures were developed for gas company technicians serving as first responders — not for property inspections to determine the need for water heater replacement and preventative maintenance. (*Id.* at SPOA2484.) Moreover, the procedures clarify that, if a level of between 11 and 69 ppm CO is detected “The employee shall evaluate the situation and take appropriate action to ventilate the building and, if necessary, evacuate the premises. Check all gas appliances for proper operation.” (*Id.*) Under Mr. Kalsbeek's procedures, in contrast, the First Rate employees were not to take any further action unless a level of 30 ppm or higher was measured on the kitchen counter. (Ex. 11, SPOA2466.)

Furthermore, the Intermountain Gas procedures explained the necessity of testing in a variety of locations throughout the living space, and that a vented gas appliance (such as the water heaters at issue here) should be red tagged if it produced any detectable amount of CO:

- (F) The First Responder will check the entire atmosphere of the structure with a CO meter.

- (1) **The entire atmosphere of the structure should be checked at all levels possible.** CO has a specific gravity of .97 which makes it very similar to air and may pocket in a room rather than rise or fill the room.
- (2) **Any detectable amount of CO shall be traced to its source.**
- (3) If a vented gas appliance is emitting **detectable amounts of CO**, and repair or adjustment cannot be made, the appliance **shall be red tagged and turned off.**

(*Id.* (emphasis added).) Mr. Kalsbeek's procedures provided for testing in only one location — on the kitchen counter — as opposed to the entire apartment unit. (Ex. 11, SPOA2466.) Additionally, Mr. Kalsbeek's procedures did not provide for the water heater to be shut down unless it produced 300 ppm CO — far in excess of any "detectable amounts," which was Intermountain Gas Company's threshold for red-tagging a water heater. (*Id.*)

Mr. Kalsbeek blatantly disregarded the Intermountain Gas testing procedures. Rather than illustrating his lack of culpability, the fact that Mr. Kalsbeek was aware of the proper procedures, but willfully disregarded them, evidences of his lack of good faith and prudence. Tellingly, after implementing his "Kalsbeek" CO testing procedures, Mr. Kalsbeek misrepresented to others that they were approved by, or based upon, Intermountain Gas Company's procedures—but they were not. (Ex. 17., Gaertner Dep. 303:14-304:1; Ex. 18, Drost Dep. 61:25-62:11 (stating that he "felt like [he] got duped" because "when Jon took control over the CO and the water heater issues" he stated that the procedures came from Intermountain Gas); *see also id.* at 394:1-20, 411:2-6; Ex. 19. SPOA688-692, at 688 (Mr. Kalsbeek stating in an email that "This procedure is based on information from Intermountain Gas, internet, Sheila and Tara's experience when this happened.")) Mr. Kalsbeek's misrepresentations here suggest that he did not act in good faith, or at least that he was unreasonable in relying on / formulating the CO procedures.

Equally as alarming, Mr. Kalsbeek affirmatively directed First Rate employees not to follow the procedures from the utility company, Intermountain Gas:

Q. Somebody is telling you, "Don't use the CO testing procedures from Intermountain Gas." Is that correct?

A. Yes.

Q. And who told you not to use those procedures?

A. Jon (Kalsbeek).

(Gaertner Dep., 95:3-10, Ex. 14 to E. Clark Dec. in Support of P's Response to POA MSJ).

The CO Exposure Pamphlet. Mr. Kalsbeek supposedly relied on an online pamphlet titled “CO Exposure and Scale of Effects from Zero to One Million Parts Per Million (ppm).” (Ex. 12, SPOA2448-2451.) This pamphlet notes that the “ ‘[a]ction’ level with regard to CO for many public safety organizations” and the “[l]evel above which many public safety organizations (fire departments, etc.) red-tag and prevent further use of combustion devices” is only 9 ppm. (*Id.* at SPOA2449.) In contrast, Mr. Kalsbeek’s testing procedures specified an action level of 30 ppm as measured on the kitchen counter — a measurement that could be taken with the gas-fired water heater turned off and all of the windows open. (Ex. 11, SPOA2466.) The action level for the measurement inside the draft hood was even higher — 300 ppm. (*Id.*) Yet again, Mr. Kalsbeek clearly disregarded a source that he supposedly relied on.

The Department of Energy Pamphlet. Yet another source that Mr. Kalsbeek supposedly relied on was a pamphlet from the Department of Energy. (Ex. 13, SPOA2452-2455.) Quite logically, the DOE Pamphlet requires that, prior to testing, a water heater should be turned on and allowed to reach a “steady state.” (*Id.* at SPOA2454.) It further provides that a reading should be taken by inserting a CO testing probe inside the water heater’s draft hood. (*Id.*) In contrast, Mr. Kalsbeek’s procedures did not require that the water heater even be turned on during testing — a glaring flaw that rendered the results completely useless. (Ex. 11, SPOA2466.) Additionally, Mr. Kalsbeek’s procedures provided for an initial test on the kitchen counter; only if high levels of CO were detected there was further testing inside the draft hood indicated. (*Id.*) There were no assurances, however, that the kitchen remained unventilated during and prior to the test. (*Id.*) Yet again, Mr. Kalsbeek obviously ignored a source that he supposedly relied on.

The “MyEurekanet” Website. Finally, Mr. Kalsbeek also allegedly relied on a website with the root URL “http://my.eurekanet.com/~rudy.” (Ex. 14, SPOA2458-49.) It is not clear why many pages from this website were not produced. However, the pages that Mr. Kalsbeek did produce deal with a complicated formula for calculating “CO Air Free” values, which does not appear to have anything to do with Mr. Kalsbeek’s testing procedures, as implemented.

E. Mr. Kalsbeek did not reasonably rely on any professional reports.

Mr. Kalsbeek vaguely claims that he “relied on information and reports provided by professionals” (Kalsbeek Aff. ¶ 13; Defs’ Memo. at 5.) This is a strange statement,

because Mr. Kalsbeek clearly disregarded the only professional report that anyone provided to him — the Engineering Consultants, Inc. (“ECI”) Report from September 16th, 2011. (Ex. 15, ECI Report, ECI14-15.) The ECI report recommended two solutions to the CO problem at Sagecrest. First, as a more expensive option, all of the water heaters could be replaced and the buildings retrofitted to pipe combustion air from outside, thereby avoiding lint collecting in the flame arrestors. (Ex. 16, ECI Report, at ECI15.) Alternatively, ECI suggested raising the water heaters onto platforms to minimize lint intake. (*Id.*) Mr. Kalsbeek did not implement either option. Therefore, he cannot claim that he relied on the ECI Report.

Although there is no detail in his affidavit (Kalsbeek Aff. ¶ 7), Mr. Kalsbeek seems to suggest that the “information and reports” he relied on were IGC’s carbon monoxide testing procedures (Defs’ Memo. at 12). As described above, Mr. Kalsbeek’s testing procedures grossly deviated from IGC’s, and those that Mr. Kalsbeek found on the internet. His purported “reliance” was actually blatant disregard for the information he collected. His knowledge of proper procedures — and decision to institute badly flawed procedures anyway — is further evidence of his reckless disregard for the lives of those staying at the Sagecrest Apartments.

III. STANDARD OF REVIEW

A. Summary judgment is improper unless the movant demonstrates that it is entitled to judgment as a matter of law and no genuine issues of material fact remain for the jury to decide.

Summary judgment is improper unless there is “no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). Thus, a court should not grant summary judgment when “the evidence is conflicting on material issues, or if reasonable minds could reach different conclusions.” *Liberty Nw. Ins. Co. v. Spudnik Equip. Co., LLC*, 155 Idaho 730, 316 P.3d 646, 649 (2013) (quoting *Peterson v. Romine*, 131 Idaho 537, 540, 960 P.2d 1266, 1269 (1998)).

“On a motion for summary judgment, the ‘burden of proving the absence of a material fact rests at all times upon the moving party.’ ” *Silicon Int’l Ore, LLC v. Monsanto Co.*, 155 Idaho 538, 314 P.3d 593, 605 (2013) (quoting *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994)). A court must “construe the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences in that party’s favor.” *Boise Mode, LLC*

v. Donahoe Pace & Partners Ltd., 154 Idaho 99, 104, 294 P.3d 1111, 1116 (2013) (quoting *Jenkins v. Boise Cascade Corp.*, 141 Idaho 233, 238, 108 P.3d 380, 385 (2005)).

B. The existence of a duty is a question of fact when it depends on the resolution of a factual dispute.

Although the existence of a duty is normally a question of law, it becomes a question of fact when it depends on the resolution of a factual dispute. *See Stoddart v. Pocatello Sch. Dist. # 25*, 149 Idaho 679, 686, 239 P.3d 784, 791 (2010) (“Normally, the foreseeability of a risk of harm, and thus whether a duty consequently attaches, is a question of fact reserved for the jury.”); *see also Kiemele v. Soo Line R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996) (“If, however, the existence of a duty is contingent on fact issues, these issues must be resolved by the trier of fact.”).

In particular, whether a party has voluntarily assumed a duty is a question of fact. *See Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 402, 987 P.2d 300, 314 (1999) (questions of fact regarding whether defendant assumed a duty through a voluntary undertaking precluded summary judgment); *see also Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*, 801 N.W.2d 193, 199 (Minn. Ct. App. 2011); *Johnson v. Jackson*, 735 S.E.2d 664, 668 (S.C. Ct. App. 2012); *Burns v. Gagnon*, 727 S.E.2d 634, 643 (Va. 2012).

Likewise, the scope of the assumed duty is a question of fact: **“Where reasonable people could differ over the nature and extent of the act undertaken, summary judgment is inappropriate, since the scope of the assumed duty will vary depending on the inferences drawn from the facts.”** *Smith v. State*, 921 P.2d 632, 634-35 (Alaska 1996) (emphasis added); *see also Steele v. Maren Eng’g Corp.*, 460 F. Supp. 2d 877, 884 (S.D. Ind. 2005) (“Whether defendant has assumed a duty and the extent of the duty it assumed are usually questions of fact for the jury to determine.”); *Resolution Trust Corp. v. Fleischer*, 890 F. Supp. 972, 981 (D. Kan. 1995) (“The precise scope of the duties [defendant] assumed necessarily involves a weighing of the facts, a task inappropriate for the court upon summary judgment.”); *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1144 (Ind. 2006) (“Whether a party has assumed a duty and the extent of that duty, if any, are questions for the trier of fact.”).

- C. In order to meet his initial burden of showing that he is entitled to summary judgment based on the affirmative defense of immunity under I.C. § 30-3-85, Mr. Kalsbeek must offer evidence proving each element of that defense.

Where a defendant moves for summary judgment based on an affirmative defense, the defendant must offer evidence proving each element of that defense. *See Chandler v. Hayden*, 147 Idaho 765, 771, 215 P.3d 485, 491 (2009) (defendant bears burden of proving affirmative defense on motion for summary judgment even when defendant is the nonmovant); *see also Anderson v. Metalclad Insulation Corp.*, 85 Cal. Rptr. 2d 331, 334 (Cal. Ct. App. 1999) (“[T]he defendant has the initial burden to show that undisputed facts support *each element* of the affirmative defense.”); *Yurcic v. City of Gallup*, 298 P.3d 500, 508 (N.M. Ct. App. 2013) (“When asserting an affirmative defense as grounds for summary judgment, the defendant carries the burden of making a prima facie showing as to each element of the definition of the defense.” (citation, quotation marks, and alterations omitted)).

IV. ARGUMENT

- A. Genuine questions of material fact preclude summary judgment on whether Mr. Kalsbeek owed duties to Plaintiffs.

Mr. Kalsbeek claims, without any elaboration, that neither “the FAC’s allegations [n]or the undisputed facts [can] be construed in any manner as alleging that any of the POA Officers assumed or otherwise undertook an individual,³ affirmative duty with regards to the Plaintiffs.” (Defs’ Memo. at 10 (emphasis in original).) Mr. Kalsbeek apparently misunderstands the

³ It is unclear why Mr. Kalsbeek underlined the word “individual.” To the extent that he meant to contend that he assumed duties only in his capacity as a director, rather than as an individual, he fails to offer any argument in elaboration on this point, and also misunderstands Idaho law. A director or officer may be held liable for torts that he or she directs, participates in, or knowingly acquiesces to. *See VFP VC v. Dakota Co.*, 141 Idaho 326, 334, 109 P.3d 714, 722 (2005) (approving of jury instruction that stated: “to be held liable a corporate director must specifically direct, actively participate in, or knowingly acquiesce in the fraud or other wrongdoing of the corporation or its officers”), *abrogated on other grounds by Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 591-92, 329 P.3d 368, 373-74 (2014) (abrogating only VFP’s suggestion that a jury must decide the equitable issue of veil piercing); *Eliopoulos v. Knox*, 123 Idaho 400, 404-05, 848 P.2d 984, 988-89 (Ct. App. 1992) (“A director who personally participates in a tort is personally liable to the victim, even though the corporation might also be vicariously liable. . . . ‘Participation’ may be found on the basis of direct action, but also may consist of knowing approval or ratification of the unlawful acts of others.”); *L.B. Indus., Inc. v. Smith*, 817 F.2d 69, 71 (9th Cir. 1987); *In re Woodman*, 451 B.R. 31, 42 (Bankr. D. Idaho 2011); *DBSI Signature Place, LLC v. BL Greensboro, L.P.*, 392 F. Supp. 2d 1206, 1214 (D. Idaho 2005).

relevant legal standard on summary judgment. An I.R.C.P. 56 motion for summary judgment does not test the adequacy of the pleadings. Moreover, the burden is on the movant to show that the undisputed facts entitle it to summary judgment, not on the nonmovant to show that the undisputed facts defeat summary judgment. The nonmovant is entitled to point to any facts — either disputed or undisputed — to show that the case merits submission to the jury.

1. **Mr. Kalsbeek owed a general duty to Plaintiffs to exercise ordinary care. The risk that individuals at the Sagecrest Apartments would be killed or severely injured was unreasonable and foreseeable. Mr. Kalsbeek had the power to avert that risk--and he affirmatively increased the risk through his flawed CO testing procedures.**

“Every person, in the conduct of his business, has a duty to exercise ordinary care to ‘prevent unreasonable, foreseeable risks of harm to others.’ ” *Braese v. Stinker Stores, Inc.*, No. 41296-2013, 2014 WL 5463057, at *2 (Idaho Oct. 29, 2014) (quoting *Turpen v. Granieri*, 133 Idaho 244, 247, 985 P.2d 669, 672 (1999)). In *Braese*, the Idaho Supreme Court evaluated whether a convenience store had a duty to protect a customer from injury by a dog that another customer had brought into the store. The plaintiff did *not* base his claim on premises liability principles, and therefore the Court did not factor the plaintiff’s status as a business invitee into its analysis. *See id.* at *2. Rather, the court determined whether the store’s policy of allowing dogs to enter created an unreasonable and foreseeable risk of injury. *See id.* at *2-3. Because there was no evidence of prior similar incidents, or any other evidence showing that such harm was foreseeable, the Court held that the store did not owe a duty to protect the customer from injury by the dog. *See id.*

Here, in contrast, Mr. Kalsbeek was aware of repeated incidents in which individuals at the Sagecrest apartment complex were exposed to harmful — and even potentially lethal — levels of CO. The CCRs permitted the Directors, in their sole discretion, to undertake maintenance or repairs in unit interiors to prevent exactly this type of harm. On repeated occasions, Mr. Kalsbeek personally interceded and micromanaged issues regarding unit interiors. However, he failed to ensure that the water heater in unit 4624 was replaced, or that a hard-wired CO detector was installed in unit 4624. He even implemented CO testing procedures that any reasonable person would have known were severely flawed and bore little resemblance to the sources that he supposedly relied on. The flawed procedures — along with Mr. Kalsbeek’s strict control of what information was provided to owners and tenants — masked the problem from

others. Thus, a reasonable jury could easily find that Mr. Kalsbeek failed to exercise reasonable care in the face of a foreseeable, unreasonable danger.

2. A reasonable juror could find that Mr. Kalsbeek voluntarily undertook to manage the response to the threat of CO poisoning at Sagecrest.

Even assuming *arguendo* that the Mr. Kalsbeek did not owe a general duty of care pursuant to *Braese* and the *Turpen* line of cases, he owed a duty as a result of his voluntary undertaking to manage the response to the threat of CO poisoning at the Sagecrest Apartments.

As noted above, the existence and scope of a voluntary undertaking are questions of fact for the jury. See *Coghlan, Ironwood Springs Christian Ranch, Johnson, Burns, Smith, Steele, Resolution Trust Corp*, and *Vaughn*, *supra* Part III.B. A jury easily could find, based on these disputed facts, that Mr. Kalsbeek undertook to manage the response to the threat of CO poisoning at the Sagecrest Apartments. He undertook to coordinate water heater replacement and hard-wired CO detector installation; to select or refuse to select a professional to perform preventative maintenance; to control the testing procedures used at the apartments; and to regulate the information provided to owners and tenants. The record is chockfull of evidence of Mr. Kalsbeek's voluntary undertaking duties, precluding summary judgment.

Just as issues of fact precluded summary judgment as against the POA, those same issues of fact preclude summary judgment as against Mr. Kalsbeek—evidence in the record establishes, as a matter of law, that Mr. Kalsbeek assumed duties in responding to the CO issue at Sagecrest; or, at a minimum, questions of material fact remain as to whether he voluntarily assumed a duty and whether he breached that duty(s) should be determined by the finder of fact.

B. Mr. Kalsbeek is not entitled to immunity pursuant to I.C. § 30-3-85.

Idaho Code section 30-3-85⁴ provides in full:

- (1) An officer with discretionary authority shall discharge his duties under that authority:
 - (a) In good faith;
 - (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

⁴ It is undisputed that Mr. Kalsbeek was a member of the Board, not just an officer. (See Ex. 16, SPOA Answers to Interrogatories Nos. 8 and 9.) However, the elements of immunity for a nonprofit's directors under I.C. § 30-3-80 are identical to the elements of immunity for a nonprofit's officers under I.C. § 30-3-85. No separate analysis is required.

- (c) In a manner the officer reasonably believes to be in the best interests of the corporation and its members, if any.
- (2) In discharging his duties an officer is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by:
 - (a) One (1) or more officers or employees of the corporation who the officer reasonably believes to be reliable and competent in the matters presented;
 - (b) Legal counsel, public accountants or other persons as to matters the officer reasonably believes are within the person's professional or expert competence; or
 - (c) In the case of religious corporations, religious authorities and ministers, priests, rabbis or other persons whose position or duties in the religious organization the officer believes justify reliance and confidence and who the officer believes to be reliable and competent in the matters presented.
- (4) An officer is not acting in good faith if the officer has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (2) of this section unwarranted.
- (5) An officer is not liable to the corporation, any member, or other person for any action taken or not taken as an officer, if the officer acted in compliance with this section.

In other words, the elements of an affirmative defense of immunity under Section 85 are:

(1) the defendant was an officer of a nonprofit corporation; (2) the defendant was acting pursuant to his or her discretionary authority; (3) the officer acted in good faith; (4) the officer acted with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (5) the officer acted in a manner the officer reasonably believed to be in the best interests of the corporation and its members.

1. **Mr. Kalsbeek has failed to offer evidence in support of each element of his affirmative defense. Therefore, he has not met his initial burden of showing that he is entitled to judgment as a matter of law.**

Mr. Kalsbeek misleadingly states that the elements of his affirmative defense are "undisputed." (Defs' Memo. at 12.) This is patently false. Mr. Kalsbeek cannot point to a single stipulation or admission that these elements are undisputed. Plaintiffs vigorously contend that Mr. Kalsbeek's actions show bad faith and a lack of ordinary prudence.

The burden is on Mr. Kalsbeek, as a defendant moving for summary judgment based on an affirmative defense, to offer evidence in support of each element of that defense. *See Chandler, Anderson, Yurcic, and Ortiz*, cited *supra* Part III.C. As explained in Plaintiffs'

contemporaneously filed *Motion to Strike*, a self-exculpatory legal conclusion is not admissible evidence and cannot be used to support a motion for summary judgment. Until and unless Mr. Kalsbeek presents some admissible evidence in support of his affirmative defense, Plaintiffs have no burden of rejoinder. Nevertheless, evidence in the record raises at a minimum questions of fact as to whether Mr. Kalsbeek acted in good faith, or whether his acts and omissions amount to ordinary prudence—summary judgment on this affirmative defense is improper as a result of the unresolved questions of material fact.

2. Even assuming *arguendo* that the conclusory allegations in Mr. Kalsbeek's affidavit constitute admissible evidence, Plaintiffs have established that genuine issues of material fact remain for trial.

The facts recited and incorporated by reference above show that Mr. Kalsbeek knew about the threat of deadly CO poisoning at the Sagecrest Apartments since July of 2011. He was aware of two incidents where tenants were exposed to potentially lethal levels of CO. He was aware of a spreadsheet that showed that numerous units, including Apartment 4624, had tested high for CO (prior to the implementation of his badly flawed procedures, which resulted in uniform “zero” readings thereafter). He was aware of a spreadsheet that showed that 128 of 192 units — including Apartment 4624 — did not have hard-wired CO detectors.

The facts also show that Mr. Kalsbeek undertook to address the known threat of deadly CO poisoning in a variety of (bizarre) ways. He undertook to coordinate the global replacement of water heaters and the installation of hard-wired CO detectors. He undertook to decide which professional preventative maintenance contractor, if any, would be hired to service water heaters at Sagecrest. He undertook to formulate CO testing procedures, and implemented procedures that he knew or should have known grossly deviated from the source material that he supposedly relied on. He also undertook to control — and limit — the flow of information about the deadly CO threat to owners and tenants.

In short, a reasonable jury easily could conclude that Mr. Kalsbeek did not act prudently and in good faith. Questions of fact surrounding Mr. Kalsbeek's motives, and why he disallowed reasonable steps to be taken by others at the Sagecrest Property, and why he mislead and “duped” First Rate employees and officers, in responding to the CO issue at Sagecrest; such questions of fact require consideration by a jury. Evidence in the record could lead a reasonable juror to conclude that Mr. Kalsbeek was negligent, reckless, or worse, in his dictatorial response

to the serious danger that someone could be injured or killed due to CO at Sagecrest—he did not act, as a matter of law, as an “ordinarily prudent person” as required to protect him with immunity under § 30-3-85. A reasonable jury could disbelieve Mr. Kalsbeek’s self-serving and conclusory protestations to the contrary.

C. It remains for the jury to decide whether Mr. Kalsbeek’s conduct was sufficiently egregious to sustain an IIED claim.

Mr. Kalsbeek’s⁵ arguments against Ms. Halowell’s IIED claim (Defs’ Memo. at 12-15) are lifted directly from his memorandum in support of his *Motion to Dismiss Intentional Infliction of Emotional Harm Claim*, filed November 3rd, 2014. To avoid unnecessary repetition, Plaintiffs incorporate by reference their *Opposition* filed on October 17th, 2014.

The only difference is that now Mr. Kalsbeek has submitted an affidavit stating that he did not intend to harm the Plaintiffs. This addition is irrelevant; specific intent is not an element of an IIED claim under Idaho law.

In his Reply Memorandum in support of his *Motion to Dismiss*, Mr. Kalsbeek claimed that “it is not settled under Idaho law that Reckless conduct is sufficient to satisfy the *mens rea* for purposes of an IIED claim.” (Reply Memo. at 5.) Mr. Kalsbeek’s attempt to create ambiguity in Idaho’s law is based on a single 1993 Court of Appeals case that did not cite any authority for the proposition that specific intent is required, and which has never been cited with approval for that proposition either. (*See Resp. to MTD*, filed Oct. 17th, 2014, at 5-6.)

To be clear: the Idaho Supreme Court has uniformly held, both before and after the Court of Appeals’ erroneous statement in 1993, that reckless misconduct is sufficient to sustain an IIED claim. *See Hopper v. Swinnerton*, 155 Idaho 801, 810, 317 P.3d 698, 707 (2013) (“the conduct must be intentional or reckless”); *McKinley v. Guar. Nat. Ins. Co.*, 144 Idaho 247, 253, 159 P.3d 884, 891 (2007) (same); *Nation v. State, Dep’t of Correction*, 144 Idaho 177, 192, 158 P.3d 953, 968 (2007) (same); *Estate of Becker v. Callahan*, 140 Idaho 522, 527, 96 P.3d 623, 628 (2004) (same); *Edmondson v. Shearer Lumber Products*, 139 Idaho 172, 179, 75 P.3d 733, 740 (2003) (same); *Steele v. Spokesman-Review*, 138 Idaho 249, 253 n.2, 61 P.3d 606, 610 n.2 (2002) (same); *Spence v. Howell*, 126 Idaho 763, 774, 890 P.2d 714, 725 (1995) (same); *Curtis*

⁵ Ms. Halowell previously dismissed her IIED claims against the other Board members. (*See Plaintiffs’ Response in Opposition to Defendants Kalsbeek, Arla, Schwab, and Meisner’s Motion to Dismiss Intentional Infliction of Emotional Harm Claim* at 2 n.1.)

v. Firth, 123 Idaho 598, 617, 850 P.2d 749, 768 (1993) (first element of IIED is “intentional or reckless conduct”); *Evans v. Twin Falls Cnty.*, 118 Idaho 210, 220, 796 P.2d 87, 97 (1990) (“the conduct must be intentional or reckless”).⁶

Apparently continuing to labor under the misconception that specific intent is required in order to sustain an IIED claim, Mr. Kalsbeek testified in his affidavit that he did not intend to harm the Plaintiffs. (Kalsbeek Aff. ¶ 14.) This testimony is irrelevant. A reasonable juror could conclude that Mr. Kalsbeek acted recklessly in the face of a known danger that tenants or guests at Sagecrest could be killed or injured by carbon monoxide. That would be sufficient to warrant a verdict against Mr. Kalsbeek on Ms. Halowell’s IIED claim.

V. CONCLUSION

In his latest brief, Mr. Kalsbeek presents little beyond what this Court has already considered in connection with the POA’s *Motion for Summary Judgment* and Mr. Kalsbeek’s two prior *Motions to Dismiss*. Mr. Kalsbeek attempts to end all factual disputes through a threadbare, self-serving, and conclusory affidavit. He hopes that his mere assertion that he acted prudently and in good faith will entitle him to immunity, and that his irrelevant statement that he lacked specific intent to inflict emotional injury will defeat Ms. Halowell’s IIED claim. However, the record is replete with factual questions for the jury to resolve. Therefore, this Court should deny Mr. Kalsbeek’s most recent *Motion*.

DATED this 20th day of November, 2014.


Tyson E. Doan
THE SPENCE LAW FIRM

⁶ A court applying Delaware law remarked that “intentional infliction of emotional distress is a misnomer because . . . it encompasses both intentional and reckless infliction of emotional distress.” *Capano Mgmt. Co. v. Transcon. Ins. Co.*, 78 F. Supp. 2d 320, 327 (D. Del. 1999). Based on the cases cited above, IIED could more correctly be referred to as “intentional or reckless infliction of emotional distress” under Idaho law as well.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of November, 2014, I caused a true and correct copy of the foregoing to be served via email, addressed to the following:

James D. LaRue jdl@elamburke.com Matthew Walters mlw@elamburke.com ELAM & BURKE, PA <i>For A.O. Smith</i>	Mark Tripp tripp.mark@bradshawlaw.com Jason C. Palmer palmer.jason@bradshawlaw.com BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C. <i>For A.O. Smith</i>
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Michael Haman mlhaman.law@gmail.com HAMAN LAW OFFICE <i>For Mathew E. Switzer and the Mathew E. Switzer Trust</i>	William A. Fuhrman BFuhrman@idalaw.com Christopher Graham CGraham@idalaw.com JONES GLEDHILL FUHRMAN GOURLEY, P.A. <i>For Anfinson Plumbing</i>
M. Michael Sasser mms@sasseringlis.com Clay Shockley cms@sasseringlis.com SASSER & INGLIS, P.C. <i>For Daniel Bakken</i>	Robert Anderson raanderson@ajhlaw.com Robert A. Mills rmills@ajhlaw.com ANDERSON, JULIAN & HULL LLP <i>For First Rate Property Management & Drost</i>


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Attorneys for Plaintiffs

NO. _____
 A.M. _____ FILED _____
 P.M. 440

NOV 20 2014

CHRISTOPHER D. RICH, Clark
 By JAMIE MARTIN
 DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF
 IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and **GRETCHEN
 HYMAS**, individually and as the natural
 parents of **PRIVATE FIRST CLASS
 MCQUEN C. FORBUSH, USMC**
 (Deceased), and **BREANNA HALOWELL**,

Plaintiffs,

vs.

**SAGECREST MULTI FAMILY
 PROPERTY OWNERS' ASSOCIATION**
et al.,

Defendants.

Case No. CV PI 1304325

**DECLARATION OF TYSON E. LOGAN IN
 OPPOSITION TO DEFENDANTS
 KALSBECK, ARLA, SCHWAB, AND
 MEISNER'S MOTION FOR SUMMARY
 JUDGMENT**

Tyson E. Logan declares and states as follows:

1. I am over 18 years of age and am competent to make this declaration.

DECLARATION OF TYSON E. LOGAN IN OPPOSITION TO DEFENDANTS KALSBECK, ARLA, SCHWAB,
 AND MEISNER'S MOTION FOR SUMMARY JUDGMENT — 1

2. I am an attorney of record for the Plaintiffs in the above-captioned case.
3. Attached hereto as Exhibit 1 are true and correct copies of documents produced in discovery, bates stamped as FR1421-1422.
4. Attached hereto as Exhibit 2 are true and correct copies of documents produced in discovery, bates stamped as SPOA 896-899.
5. Attached hereto as Exhibit 3 are true and correct copies of the relevant portions of the deposition of Jon Kalsbeek.
6. Attached hereto as Exhibit 4 are true and correct copies of documents produced in discovery, bates stamped as FR 7098-7101.
7. Attached hereto as Exhibit 5 are true and correct copies of documents produced in discovery, bates stamped as SPOA 2370-2373.
8. Attached hereto as Exhibit 6 are true and correct copies of documents produced in discovery, bates stamped as SPOA 2374-2375.
9. Attached hereto as Exhibit 7 are true and correct copies of documents produced in discovery, bates stamped as SPOA 2658-2670.
10. Attached hereto as Exhibit 8 are true and correct copies of documents produced in discovery, bates stamped as FR 2869-2871.
11. Attached hereto as Exhibit 9 are true and correct copies of documents produced in discovery, bates stamped as SPOA 2443.
12. Attached hereto as Exhibit 10 are true and correct copies of documents produced in discovery, bates stamped as SPOA 2484-2485.
13. Attached hereto as Exhibit 11 are true and correct copies of documents produced in discovery, bates stamped as SPOA 2466.

14. Attached hereto as Exhibit 12 are true and correct copies of documents produced in discovery, bates stamped as SPOA 2448-2451.

15. Attached hereto as Exhibit 13 are true and correct copies of documents produced in discovery, bates stamped as SPOA 2452-2455.

16. Attached hereto as Exhibit 14 are true and correct copies of documents produced in discovery, bates stamped as SPOA 2458-2459.

17. Attached hereto as Exhibit 15 are true and correct copies documents produced in discovery, bates stamped ECI 14-15.

18. Attached hereto as Exhibit 16 are Defendant Sagecrest Multi-Family Property Owners Association Answers to Interrogatories Nos. 8 and 9.

19. Attached hereto as Exhibit 17 are true and correct copies of the relevant portions of the deposition of Tara Gaertner.

20. Attached hereto as Exhibit 18 are true and correct copies of the relevant portions of the deposition of Tony Drost.

21. Attached hereto as Exhibit 19 are true and correct copies documents produced in discovery, bates stamped SPOA 688-692.

I declare under penalty of perjury under the laws of the State of Idaho and the laws of the United States, that the foregoing is true and correct.

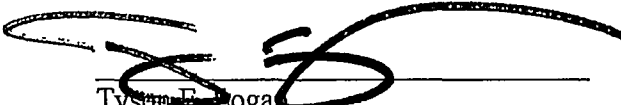
DATED this 20th day of November, 2014.


Tyson E. Logan
THE SPENCE LAW FIRM, LLC

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Robert Anderson raanderson@ajhlaw.com Robert A. Mills rmills@ajhlaw.com ANDERSON, JULIAN & HULL LLP <i>For First Rate Property Management & Drost</i>	M. Michael Sasser mms@sasseringlis.com Clay Shockley cms@sasseringlis.com SASSER & INGLIS, P.C. <i>For Daniel Bakken</i>


Tyson E. Logan

From: Tony Drost
Sent: Thursday, July 21, 2011 9:25 AM
To: Sagecrest; Lizz Loop; Marie Swanson; Sheila Thomason
Subject: RE: Red flag

Please let me know the results of the test. I am having a hard time believing that we have to replace them and there is no acceptable retro available. But, I'll trust the experts.



Tony A. Drost
www.frpmrentals.com
www.boiseinvestmentproperties.net



From: Sagecrest
Sent: Wednesday, July 20, 2011 11:23 AM
To: Tony Drost; Lizz Loop; Marie Swanson; Sheila Thomason
Subject: Red flag

We have a very serious situation going on at Sagecrest. I just had a meeting with the big wigs at Intermountain Gas and Ben and Brad with Express Plumbing. Monday night there was an emergency call regarding gas smell from 1811. Intermountain Gas came out and the reading of the Carbon Monoxide was deadly. If the tenants had been in there for 45 more minutes they would have died. Exact words Intermountain Gas used. They were wanting to know what was being done to fix this problem in the past. Breaking the honey cone and cleaning the vent is what they have done in the past. Intermountain Gas is no longer going to be clearing the water heaters if they have been "modified." Ben is done with the AOSmith water heaters. Express is no longer going to be doing any kind of cleaning or maintenance on these water heaters. We have all conclusion that the only way to fix this problem without modifying the water heater is to replace them completely.

I talked to Jon about this last night, he said since this is an owner expense that I'll have to send something to the owners and have them decide what they want to do. If they want to replace all together at the same time or do them once a month for example. Talking with Express and Intermountain Gas they both said they firmly do not think this should even be an option to the owner, that all AOSmith water heaters need replaced regardless and they need replaced as soon as possible. If the owners decide they do not want to then they will have to sign a waiver basically stating that if a tenant dies FRPM, Express & Intermountain Gas is not held liable for it.

CONFIDENTIAL

000670 FR01421

Intermountain Gas wants to know what is being done NOW to prevent this from happening tomorrow. I am delivering notices to all doors today. Express is going out and buying a Carbon Monoxide tester today and will be out tomorrow testing everyone's water heater to make sure there are no high readings.

My question is: Can we make the replacing of the water heaters mandatory or does it have to be an option to the owners?

Tara Gaertner

Sagecrest Apartments

First Rate Property Management

P: (208) 514-4304

F: (208) 884-3487

www.sagecrestapts.com

Become a Fan!



2

To: Christopher Schwab[cmschwab@aol.com]
Cc: Bycappa@aol.com[Bycappa@aol.com]; jay.arla@gmail.com[jay.arla@gmail.com]
From: VJK
Sent: Wed 7/27/2011 2:10:08 AM
Subject: Re: Stair Repair, HUD-IFHC, Water Heaters, Annual Meeting, Budget v Actual June

Very good thoughts and this is what I found out today, the proximity of the dryer are the units with most of the problems. The only thing I can think of, is a barrier installed between the dryer and water heater, not even sure that would work, will explore the idea.

Been waiting for an update on the situation, was hoping to hear more details today. At this point the filter cannot be cleaned. according to express, from my understanding. This means that if air cannot reach the burner and take the gases out the vent, the smell and hazard will occur.

Waiting on additional details, will let you know.

Virginia and Jon

--- On **Mon, 7/25/11**, **Christopher Schwab <cmschwab@aol.com>** wrote:

From: Christopher Schwab <cmschwab@aol.com>
Subject: Re: Stair Repair, HUD-IFHC, Water Heaters, Annual Meeting, Budget v Actual June
To: "VJK" <aire1@pacbell.net>
Cc: "Bycappa@aol.com" <Bycappa@aol.com>, "jay.arla@gmail.com" <jay.arla@gmail.com>
Date: Monday, July 25, 2011, 10:25 PM

I assume that the "honeycomb filter" that has been removed is the flame arrestor plate. I agree with the gas company that these should not have been removed and am surprised that the plumbing company would have done this. All newer water heaters are required to be Flammable Vapor Ignition Resistant (FVIR) and it is these plates, with their small holes, that prevent the heaters from igniting flammable vapors that may be present in the areas around the heaters.

Having the heaters in the same areas as the clothes dryers, with all of their lint, is not the best situation. If lint is clogging the holes on these plates, a program of routine cleaning of the plates and checking to see that the dryer vent hoses are clear and properly connected is probably in order. (Maybe when the air filters are changed.) It is also important that the tenants do a reasonable job of keeping their laundry areas clean. (Not sure how one does that.) I also think that going to a different brand of water heater is probably not going to solve this problem. I think that

H&H had at least one of our heaters changed to a different brand (that was supposed to last longer) when it gave out. I suspect that a number of the heaters in the complex have been changed from the original brand by now.

It is my feeling that the heaters that have been modified should definitely be replaced. (Express Plumbing responsibility?)

-Chris

On Jul 25, 2011, at 8:45 PM, VJK <aire1@pacbell.net> wrote:

Yes, we have had a lot of problems with these water heaters, mostly the flooding from broken coils or the water heater itself. This is not really a new problem, just a different problem that has been dealt with, now that the gas company is involved because a several tenants called the gas company directly about smelling gas, hence the gas company has become very concerned. Express plumbing has gone out and cleaned the bottom of these units and removed the honeycomb filter at the bottom that gets clogged. The gas company discussed this with express and does not like that the water heater is being modified. The problem is gas smell and fumes from either the intake being clogged or the exhaust vent clogging. Is this a defect of the water heater or a maintenance issue. FRPM is researching this with express plumbing and the gas company. The conclusion is that replacement is the best solution - with a different brand of water heater. The gas smell and high CO2 readings is what the concern is and why it is being explained as hazardous.

These water heaters are over 6 to 7 years old, I believe this is average time of replacement, ours usually go out at 5 to 6 years and if you are really lucky maybe close to 10 years. FRPM is working with each owner that has this brand of water heater -to deal with replacement. This was more of an informational item than anything else. I am trying to get something out to all owners from the board, have not got to it yet.

Virginia and Jon

— On Sat, 7/23/11, Bycappa@aol.com <Bycappa@aol.com> wrote:

From: Bycappa@aol.com <Bycappa@aol.com>
Subject: Re: Stair Repair, HUD-IFHC, Water Heaters, Annual Meeting, Budget v Actual June
To: cmschwab@aol.com, aire1@pacbell.net
Cc: jay.arla@gmail.com

Date: Saturday, July 23, 2011, 11:18 PM

I agree regarding the water heaters. Would also like to know why they are hazardous-no emergency shut off? Cooper tubing?? what? Is it the same water heater in every unit? We have had extensive work related to the water heaters when the fail occurs and no one has said anything about them being hazardous.

Barbara

In a message dated 7/23/2011 10:59:08 P.M. Pacific Daylight Time, cmschwab@aol.com writes:

Think we need more info from FRPM. If the heaters are as dangerous as the gas company seems to be saying, would think there would already be a recall by the Consumer Product Safety Commission. No need for an attorney. I know that there are some that have been recalled.
-Chris

On Jul 23, 2011, at 6:00 PM, VJK <aire1@pacbell.net> wrote:

Agree with the water heater recall, we would need to document a serious situation and then pursue the company, this could be quite costly to have an attorney unless we can find one for contingency fees. Any suggestions - anyone?

Thanks for the impute.

Virginia and Jon

--- On Thu, 7/21/11, Chris Schwab <cmschwab@aol.com> wrote:

From: Chris Schwab <cmschwab@aol.com>
Subject: Re: Stair Repair, HUD-IFHC, Water Heaters, Annual Meeting, Budget v Actual June
To: "VJK" <aire1@pacbell.net>
Cc: "Barbara Cappa" <Bycappa@aol.com>, "Jay Arla" <jay.arla@gmail.com>, "aire1@pacbell.net" <aire1@pacbell.net>
Date: Thursday, July 21, 2011, 3:17 PM

Stair repairs sound good. Guess we just wait on the HUD matter. I would like to

know more on the water heater problem. Seems that even though they are out of warranty, if they are as bad as the gas company says, there should be a recall.
-Chris

Sent from my iPhone

On Jul 19, 2011, at 9:01 PM, VJK <aire1@pacbell.net> wrote:

Updates--

We have a new company to repair the stairs, the cost is \$130 per stairwell or for 39 stairs \$5070 total. This is less than previously and the repair has been approved by the board we can move ahead with this repair. I will schedule the work if there are no objections by Mon. July 25. Thank you.

The HUD-IFHC complaint, IFHC got back to Tony and stated that HUD will not let the owner or POA out of the complaint. We are still a party to this situation. Nothing more to say until we receive more information. The worst case at this time is we need to get an attorney, will let you know when they let me know.

A situation occurred today with a building unit of having a gas smell, this caused the gas company to investigate the situation and found that the original water heaters are considered hazardous by the gas company, this has prompted the need to replace them. FRPM is in the process of working with owners to get these units replaced. More information should be coming from FRPM. The water heaters are out of warranty.

Annual meeting is on October 31, 2011 Monday at 10:00 am. We are in the process of making up the agenda, are there any items you would like included? At this point basic items are review of 2011, budget 2012, water heaters, stairs, vacancies, CC&R's, landscape bids, Misc.

Attached are FRPM budget form and our budget form for June 2011, Please review. We appear to be on track with expenses.

Any other issues, please let me know.

Virginia and Jon

<Actual vs Budget 2011-June FRPM Form.pdf>

<Actual vs Budget 2011-June.pdf>

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3

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as
the natural parents of
PRIVATE FIRST CLASS McQUEN C.
FORBUSH, USMC (Deceased),
and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTIFAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an
Idaho non-profit corporation,
d/b/a SAGECREST MULTIFAMILY
PROPERTY OWNERS' ASSOCIATION,
et al.,

Defendants.

Case No. CV PI 1304325

DEPOSITION OF JON KALSBECK

April 3 and 4, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

1 monoxide, water heaters, carbon monoxide detectors,
2 anything like that?
3 MR. HOWELL: No.
4 MR. CLARK: Okay.
5 MR. HAMAN: Was this an existing tenant that
6 was applying for a renewal?
7 MR. HOWELL: No.
8 MR. HAMAN: Okay.
9 MR. CLARK: To follow up on Mike's question,
10 the -- Intermountain Fair Housing was the
11 plaintiff.
12 Did they represent a former tenant from
13 Sagecrest?
14 MR. HOWELL: As I understand it, they don't
15 represent tenants; they don't represent people.
16 The entity brings the claim.
17 If you've been involved in FHA cases,
18 the Fair Housing Council does this from time to
19 time.
20 MR. HAMAN: But someone has to initiate it
21 with Fair Housing? Like --
22 MR. ANDERSON: No.
23 MR. HOWELL: No.
24 MR. HAMAN: Okay.
25 MR. CLARK: Okay.

[Page 16]

1 Q. (BY MR. CLARK) Mr. Kalsbeek, let's go
2 into a little bit about your education.
3 Do you have a certificate from a high
4 school? Did you graduate from high school?
5 A. Yes.
6 Q. Where did you graduate from?
7 A. Alhambra High School.
8 Q. Where is that?
9 A. Martinez, California.
10 Q. What year did you graduate?
11 A. 1971.
12 Q. Do you have any type of --
13 '71?
14 A. Yes.
15 Is that loud enough for you down there,
16 or does it need to be louder?
17 MR. ANDERSON: It's getting better.
18 THE WITNESS: Getting better? Okay.
19 Q. (BY MR. CLARK) Did you have any
20 shop-related classes in high school?
21 A. High school? Not in high school that I
22 can recall.
23 Q. Okay. Do you have a -- any type of
24 college-level degree?
25 A. Yes.

[Page 17]

1 Q. What degree do you have?
2 A. Bachelor's.
3 Q. And where did you get your bachelor's?
4 A. University of California, Santa Barbara.
5 Q. What year did you graduate?
6 A. 1975.
7 Q. What was your degree in?
8 A. Political science.
9 Q. Do you have any graduate-level degrees?
10 A. No.
11 Q. Do you have any other college-level
12 courses that you took other than at Santa Barbara?
13 A. No.
14 Q. Did you go to Santa Barbara for four
15 years?
16 A. Yes.
17 Q. Okay. Did you work while you were
18 attending college?
19 A. Part-time jobs.
20 Q. Okay. Anything related to working for a
21 gas company or working with carbon monoxide, any
22 type of testing, anything like that?
23 A. No.
24 Q. Okay. What did you do after you
25 graduated in '75 from Santa Barbara?

[Page 18]

1 A. Got married.
2 Q. Okay. Is that Virginia?
3 A. Yes.
4 Q. Okay. What year was that?
5 A. '76, 1976.
6 Q. Okay. What did you do for employment
7 after you graduated from Santa Barbara?
8 A. I worked in a liquor store. While
9 working at the liquor store, I got my pilot's
10 license. Then I taught flying, did flight lessons,
11 then flew as a pilot.
12 Q. Who did you fly for?
13 A. It was a charter outfit. It was --
14 Do you want the name?
15 Q. Sure.
16 A. Cal-Todd Aviation.
17 THE REPORTER: Can you spell that for me?
18 THE WITNESS: C-a-l, dash, T-o-d-d.
19 THE REPORTER: Thank you.
20 Q. (BY MR. CLARK) Okay.
21 A. And there were several other airlines
22 and different positions as pilot as you climb the
23 ladder.
24 Q. Okay. Was that your primary vocation,
25 as a pilot?

[Page 19]

[10] (Pages 16 to 19)

1 A. Started off to be. It did not end up to
2 be.
3 Q. Okay. Well, let's --
4 How long were you a pilot?
5 A. From '70 --
6 Including training would be '76 to
7 today.
8 Q. Okay.
9 A. As an occupation, until '82 or '90.
10 '90, I guess, would be a better --
11 I did it part time.
12 Q. While you were a pilot from '76 to '89,
13 did you have any other type of employment?
14 A. Yes.
15 Q. What did you do?
16 A. I worked for the federal government as
17 an air traffic controller.
18 Q. Where were you working as an air traffic
19 controller?
20 A. At what point in time?
21 Q. Well, you've got --
22 Between '76 and '89.
23 A. That would have been Concord,
24 California, and Oklahoma City, Oklahoma. And, oh,
25 yeah, Reno, Nevada.

[Page 20]

1 Q. Okay. So we're up to '89 now. You've
2 been a pilot and you were -- you worked as an air
3 traffic controller.
4 Is that correct?
5 A. Yes.
6 Q. Okay. What happened in '89? Did you
7 change both of those?
8 A. You asked how long I was a pilot. So I
9 did flight instruction while I was working as an
10 air traffic controller and did that on the side.
11 Q. Right. I understand.
12 A. And then air traffic control until I
13 retired in 2005. After that, it was more pleasure
14 flying than instruction.
15 Q. Okay. So I've got that you were a pilot
16 from '76 through '89, working as a pilot from '76
17 to '89.
18 Is that not correct?
19 A. Part of that from '76 to '82 was full
20 time.
21 Q. Okay.
22 A. '82 to '89 would be part time.
23 Q. Okay. And '89, you stopped employment
24 as a pilot, stopped being employed?
25 A. Give or take because it was just

[Page 21]

1 students that we were --
2 We would do freelance flight
3 instruction.
4 Q. Okay. And you retired from your air
5 traffic control job in 2005.
6 Is that correct?
7 A. I believe that was the year.
8 Q. Okay. What have you been doing for
9 employment since 2005?
10 A. None.
11 Q. Okay. Would you call that retirement?
12 A. Definitely.
13 Q. Okay. Do you have any professional
14 licenses? Obviously, you have a private pilot's
15 license.
16 A. (Witness indicates.)
17 Q. Do you have a commercial pilot's
18 license?
19 A. Yes.
20 Q. Okay. What are your ratings?
21 A. Airline transport pilot multiengine,
22 single engine, instrument. I think that's all.
23 Q. Now, does your air traffic control job
24 have some type of certification or license?
25 A. Yes.

[Page 22]

1 Q. Okay. And what is that?
2 A. Control tower operator or air traffic
3 control operator. I'm not sure how they phrase it,
4 but --
5 Q. Okay. While you were training or
6 working as a pilot, did you have any training or
7 experience with regard to carbon monoxide?
8 A. Not that I can recall.
9 Q. Okay. I don't know much about the ATC
10 profession.
11 What kind of training did you undergo to
12 earn your license as an air traffic controller?
13 A. In a short sentence, how to separate
14 airplanes.
15 Q. Well, I'm -- I'm asking what kind of
16 training.
17 Did you go to school for that? Did you
18 take a course? How did you --
19 A. You -- you get hired, and then they send
20 you to a school for six months.
21 Q. Okay.
22 A. And then you have on-the-job training.
23 Q. Where did you go to school for six
24 months for the ATC?
25 A. Oklahoma City.

[Page 23]

[11] (Pages 20 to 23)

1 Q. At any time, did you work for a natural
2 gas company?
3 A. No.
4 Q. Have you ever worked with a company --
5 Let me scratch that and ask you a better
6 question.
7 Have you ever had any specific carbon
8 monoxide related training as it applies to testing
9 or detecting?
10 A. No.
11 Q. I understand you're the president of the
12 Sagecrest Property Owners' Association.
13 Is that correct?
14 A. Yes.
15 Q. How long have you been a member -- or
16 the president? Excuse me.
17 A. President or member?
18 Q. Well, I'll ask you both.
19 A. Okay.
20 Q. How long have you been president?
21 A. They're pretty close in that time.
22 So from 2008, 2009, 2010, 2011, 2012,
23 2013 to present.
24 Q. Okay.
25 A. So what's that? Six years.

[Page 24]

1 Q. Okay. And you said --
2 MR. ANDERSON: I couldn't understand that
3 question.
4 Is that since he's owned property or
5 been the president?
6 MR. CLARK: Yeah. I asked him how long he's
7 been the president of the POA.
8 Q. (BY MR. CLARK) How long have you been on
9 the board of the Sagecrest POA?
10 MR. FUHRMAN: Eric, can you speak up a
11 little bit?
12 MR. CLARK: I'm sorry.
13 MR. FUHRMAN: You're really speaking
14 quietly.
15 THE WITNESS: Okay. That was the board.
16 Q. (BY MR. CLARK) Okay.
17 A. From 2008.
18 Q. Okay. How long have you been a member
19 of the Sagecrest POA?
20 A. From 2007, so that would be one more
21 year. What, seven years?
22 Q. Okay. Do you have to own property at
23 Sagecrest to be a member of the board?
24 A. At what point in time?
25 Q. I guess by your response, was there --

[Page 25]

1 Did that criteria change at some point?
2 A. Yes, it did.
3 Q. Okay. When did that criteria change?
4 A. November 5th, 2012.
5 Q. And how did that criteria change?
6 A. The CC&Rs were amended.
7 Q. And what was the amendment?
8 A. There were numerous amendments.
9 Q. Well, I'm --
10 With regard to the ownership of
11 property, do you now have to own property?
12 A. You have to own property in Sagecrest to
13 be on the board.
14 Q. Okay. Prior to November 5th, 2012, you
15 did not have to own property to be --
16 A. You did not.
17 THE REPORTER: Make sure you let him finish
18 his question before you start answering.
19 THE WITNESS: Oh, I'm sorry.
20 THE REPORTER: Thank you.
21 Q. (BY MR. CLARK) How did you hear about
22 McQuen's death?
23 A. A phone call.
24 Q. From who?
25 A. Lizz Loop.

[Page 26]

1 Q. What did she tell you?
2 A. She said there was a death at the
3 complex.
4 Q. Did she tell you what caused the death?
5 A. I don't recall the exact wording of it.
6 I believe it was just there was a death at the
7 complex.
8 Q. Okay. When did she call you?
9 A. I believe it was around the noon hour,
10 1:00 on -- I'm pretty sure it was Saturday, the
11 10th. I could be wrong on that --
12 Q. Okay.
13 A. -- date, but --
14 Q. What did you do after receiving Lizz's
15 phone call?
16 A. I called the board members.
17 Q. And just for the record, will you
18 identify those -- your fellow board members?
19 A. There is Jay Arla, David Meisner, Chris
20 Schwab.
21 Q. Okay.
22 A. Christopher.
23 Q. You said you called the board.
24 Is that correct?
25 A. Yes.

[Page 27]

[12] (Pages 24 to 27)

1 MR. ANDERSON: It's a simple --
 2 Q. (BY MR. CLARK) When you say this e-mail
 3 is a response to your e-mail, are you writing,
 4 "Here is a recap"?
 5 A. No. Sheila is writing the recap.
 6 Q. Okay.
 7 MR. ANDERSON: Eric, it says, "See below,"
 8 with colons. Ask him what that means. It's all in
 9 bold at the top.
 10 MR. GREENER: Yeah.
 11 MR. ANDERSON: This record is going to be --
 12 Q. (BY MR. CLARK) Okay. Go to the top of
 13 the page.
 14 From VJK --
 15 A. Okay.
 16 Q. -- to Tony Drost, Sheila Thomason.
 17 Do you remember this e-mail?
 18 A. Yes.
 19 Q. Okay. And as Mr. Anderson pointed out,
 20 it says, the very last line, "Hence, not everything
 21 Tony mentioned was discussed between you and me.
 22 See below."
 23 And you're referring to the e-mail
 24 below.
 25 Is that correct?

[Page 68]

1 A. Yes.
 2 Q. So are your --
 3 Based on that information, do you now
 4 believe that the bold lettering in response in
 5 Sheila's e-mail is your statement?
 6 A. Yes, I do.
 7 Q. Okay. Let's look at 107, please.
 8 MR. ANDERSON: What are we on now?
 9 MR. CLARK: 107.
 10 MR. ANDERSON: Thank you.
 11 Q. (BY MR. CLARK) Beginning at the very
 12 bottom of page -- of the second page, there is an
 13 e-mail from Sheila Thomason with the subject,
 14 "Water heaters needs replaced ASAP."
 15 Do you see that?
 16 A. Yes.
 17 Q. Have you seen this document before?
 18 A. Yes.
 19 Q. When did you see it?
 20 A. I would believe it would be around -- or
 21 about July 30th to the 1st, somewhere in there.
 22 Q. Okay. Sheila writes, "Intermountain Gas
 23 told us and the tenants they could have died if
 24 they were in the apartment much longer. This was
 25 very alarming to all of us, especially since this

[Page 69]

1 could be happening in any of the" --
 2 MR. HOWELL: Eric, can you just tell us
 3 where you're reading from?
 4 MR. CLARK: Yeah. Top -- first paragraph of
 5 the -- of page 1643 beginning with the second,
 6 "Intermountain Gas."
 7 MR. ANDERSON: 1643.
 8 MR. CLARK: 1643. About fifth line down
 9 beginning, "Intermountain Gas."
 10 MR. HOWELL: Okay. Got it.
 11 MR. CLARK: Sorry.
 12 Q. (BY MR. CLARK) Do you remember reading
 13 that statement?
 14 A. I don't remember reading that statement,
 15 but I'm sure I did.
 16 Q. Okay. Do you -- do you recall what you
 17 thought when you heard that statement -- or read
 18 that statement?
 19 MR. HOWELL: Objection; form.
 20 THE WITNESS: I don't recall.
 21 Q. (BY MR. CLARK) Did you dispute that
 22 statement in any manner?
 23 A. Absolutely not.
 24 Q. Okay. Now, this e-mail -- particular
 25 e-mail is from Sheila Thomason to Sheila Thomason.

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1 Then as you go up to the top of the page
 2 1642 and onto 1641, the first page, there's
 3 ultimately an e-mail from VJK to Tony Drost, about
 4 three-quarters of the way down the first page,
 5 "Subject: Water heater needs replaced ASAP."
 6 You say, "Did not know if you had seen
 7 this. Per our conversation, I said I would forward
 8 it to you."
 9 Are you forwarding Sheila's "Water
 10 heater needs replaced ASAP" to Tony Drost?
 11 A. I couldn't tell you from this
 12 information. It appears to be that way.
 13 Q. Okay. You say, "I did not know if you
 14 had seen this. Per our conversation, I said I
 15 would forward it to you."
 16 So you're forwarding something?
 17 A. Yes.
 18 Q. And it's got the same subject line as
 19 the prior e-mail?
 20 A. Yes.
 21 Q. So is it fair to say at this point in
 22 time you had seen and read -- or read Sheila's
 23 e-mail, "Water heater needs replaced ASAP"?
 24 A. August 3rd? Yes, I would say that I had
 25 seen it.

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[23] (Pages 68 to 71)

1 Q. Okay. Do you recall -- do you recall
2 seeing this document before?
3 A. Yes.
4 Q. Could you explain what this document is?
5 A. It appears to be a CO testing -- carbon
6 monoxide procedures.
7 Q. Were those the carbon monoxide
8 procedures that were in place after March 2012 at
9 First Rate -- or at Sagecrest? Excuse me.
10 MR. ANDERSON: I'm not sure what the
11 question is now.
12 Can you read the question back.
13 (Record read by reporter.)
14 THE WITNESS: As far as I know, I believe
15 so, yes.
16 Q. (BY MR. CLARK) Okay. Whose idea was it
17 to draft written carbon monoxide testing
18 procedures?
19 A. I believe I came to First Rate and said,
20 "You need to get some written instructions."
21 Q. Why did you do that?
22 A. Because we were called --
23 We had a high test on one of our water
24 heaters, and we got a call two days later and said
25 it was okay. We physically came to the property

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1 and tested it with Tara, and it tested okay.
2 And I questioned, "Why are there
3 different readings?" And I asked at that time if
4 there were written procedures, and she told me no.
5 Q. Okay. So just for clarification, you
6 were called regarding one of your properties at
7 Sagecrest?
8 A. Yes.
9 Q. Okay. And the water heater had tested
10 high in one of those properties?
11 A. Tara had said it tested high.
12 Q. Okay. Did she say whether she had
13 tested or Intermountain Gas had tested? Do you
14 know?
15 A. Which test?
16 Q. Well --
17 MR. ANDERSON: Eric, which property?
18 Q. (BY MR. CLARK) What building number were
19 the tests --
20 A. 3724.
21 MR. ANDERSON: Thank you.
22 Q. (BY MR. CLARK) Okay. What --
23 You talked about an original test being
24 high.
25 A. Yes.

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1 Q. Tara told you of an original test that
2 was high.
3 Did she tell you that she had tested or
4 that Intermountain Gas had tested?
5 A. She didn't tell me.
6 Q. Okay. So she -- then she tested again
7 with you there.
8 Is that my understanding?
9 A. We got an e-mail that says Express had
10 gone out and retested, and it was fine. And then
11 we went up and investigated ourselves to make sure
12 that things were fine.
13 Q. When you investigated yourself, who
14 did --
15 Was there another CO test conducted?
16 A. Yes.
17 Q. Who did the CO test?
18 A. Tara.
19 Q. Okay. And did she walk you through the
20 ways that she had been taught to test by
21 Intermountain Gas?
22 MR. HOWELL: Objection; form.
23 THE WITNESS: No.
24 Q. (BY MR. CLARK) Do you recall how she
25 tested for carbon monoxide in your apartment?

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1 A. She came in, turned on something in the
2 bathroom, which was water. She walked in and put
3 an instrument of some sort into the water heater
4 and said, "Look. It says it's fine." She turned
5 off the water, and we left.
6 Q. Okay. You don't know what the
7 instrument she was using was?
8 A. I believe it was the CGI that we had
9 purchased, but I did not verify that it was the
10 same one.
11 Q. Do you have any reason to believe that
12 it wasn't the same one?
13 A. I have no reason to believe that.
14 Q. Okay. What information did you obtain
15 from any source regarding these testing procedures?
16 A. One more time, please.
17 MR. CLARK: Can you read that back.
18 (Record read by reporter.)
19 MR. ANDERSON: And you're referring to
20 Exhibit 53?
21 MR. CLARK: 53.
22 MR. ANDERSON: Have we established who wrote
23 Exhibit 53 so that maybe we can work from that
24 foundational basis?
25 MR. GREENER: Not yet.

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[28] (Pages 88 to 91)

<p>1 MR. CLARK: Well, I'm working up to that, 2 Rob. Give me a minute. 3 MR. ANDERSON: Sounds good. 4 Q. (BY MR. CLARK) Can you answer the 5 question? 6 A. Okay. One more time. I'm sorry. 7 (Record read by reporter.) 8 THE WITNESS: The information obtained was 9 from the Department of Energy on -- I don't recall 10 the -- the name of it, but it was Department of 11 Energy on testing gas appliances. 12 There was a document from Intermountain 13 Gas that came out of their manual, and there was a 14 document from the internet that clarified how tests 15 are read. I forget the name of the e-mail. 16 MR. HAMAN: E-mail or the internet? 17 THE WITNESS: The internet. Sorry. 18 MR. HAMAN: This is 137 that's already in 19 here. 20 MR. CLARK: But there's more pages attached 21 to it. 22 MR. HAMAN: Okay. So do we want to remove 23 this 137? 24 MR. CLARK: Exactly. 25 MR. HAMAN: Okay.</p> <p style="text-align: right;">[Page 92]</p>	<p>1 A. Okay. Okay. 2 Q. Your testimony a minute ago was you had 3 some information from the Department of Energy 4 regarding testing gas appliances. 5 Is that correct? 6 A. Yes. 7 Q. Would you look at these exhibits and see 8 if that information is attached to that -- to 9 Sheila's e-mail. 10 A. Yes, it is. 11 Q. Okay. Could you give me just the page 12 numbers that you believe reflect -- 13 A. SPOA 002452. 14 Q. Okay. 15 MR. HOWELL: And continue. 16 THE WITNESS: Oh, all of them? 17 SPOA 002453. 18 Q. (BY MR. CLARK) Just the last page is 19 fine. 20 A. 24 -- 21 Oh, the last page? 22 Q. Yeah, the last page of this particular 23 document. 24 A. 2455. 25 Q. Okay. Now, you referred to an</p> <p style="text-align: right;">[Page 94]</p>
<p>1 MR. PALMER: Has the old 137 been referred 2 to yet? 3 MR. CLARK: I don't believe so. 4 MR. PALMER: Because if it has, you're 5 saying remove it? Let's not remove it. Let's make 6 this 137-A. 7 MR. CLARK: Okay. Whatever you want to do 8 is fine. 9 MR. ANDERSON: Let's look and see if it's -- 10 MR. HAMAN: I sort of think this has been 11 referred to. 12 MR. CLARK: Okay. Then we'll make this A. 13 MR. HAMAN: Let's just mark it 137-A and be 14 done with it. 15 (Deposition Exhibit No. 137-A was marked.) 16 Q. (BY MR. CLARK) Would you take a look at 17 137-A, please. 18 A. Yes. 19 MR. HOWELL: Anything in particular that you 20 want him to look at? It's a thick document. 21 Q. (BY MR. CLARK) In the middle of the 22 first page, it says, "Attach the paperwork Jon 23 brought in regarding carbon monoxide." 24 I'd like to have you look at the 25 exhibits attached beginning on page 2448.</p> <p style="text-align: right;">[Page 93]</p>	<p>1 Intermountain Gas Company manual. 2 A. Yes. 3 Q. Are there any documents in here that 4 were taken from that manual? 5 A. I do not see them. 6 Q. Do you know if you provided those 7 documents to First Rate Property Management at any 8 time -- 9 A. Yes. 10 Q. -- regarding the IGC manual? 11 A. Yes. 12 Q. Do you -- 13 Can you tell me when you believe you 14 sent those documents or provided those documents 15 to -- 16 A. They were provided on March 20th, 2012. 17 Q. Was there a face-to-face meeting at that 18 day -- on that day? 19 A. Yes, there was. 20 Q. Okay. And you said you got some 21 information off the internet. 22 Is any of that information provided 23 in -- attached to Exhibit 137-A? 24 A. I believe the documents that -- that 25 were from the internet are SPOA 002456 to</p> <p style="text-align: right;">[Page 95]</p>

1 SPOA 002459.
2 Q. Okay. There's some other documents that
3 you haven't --
4 What about --
5 Sorry.
6 MR. ANDERSON: Hey, Eric, are these the
7 Intermountain Gas documents? Maybe just ask him,
8 and then we'll make a copy if you want it.
9 Do you have those?
10 MR. CLARK: I don't -- I don't think they're
11 in this exhibit.
12 MR. ANDERSON: Well, these are --
13 Okay. I'm just saying that I don't
14 think they're in your exhibit, and maybe that would
15 help clarify what else he's talking about. And it
16 may not be, but --
17 Q. (BY MR. CLARK) Would you take a look at
18 those three pages for me.
19 A. Okay.
20 Q. Do you recall if that is the information
21 that you obtained from Intermountain Gas Company?
22 A. Yes, it is, along with SPOA 2460 and
23 2461.
24 Q. Is that the --
25 MR. PALMER: Are we going to mark those?

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1 Q. (BY MR. CLARK) The 2460 and 2461, that's
2 documents obtained from Intermountain Gas?
3 A. It goes with those documents.
4 MR. CLARK: Let's mark the documents that
5 Rob provided as 137-B.
6 (Deposition Exhibit No. 137-B was marked.)
7 MR. ANDERSON: We'll go off the record.
8 (Discussion held off the record.)
9 Q. (BY MR. CLARK) Mr. Kalsbeek, you've been
10 handed another document.
11 Did you have a chance to look at that?
12 A. Yes.
13 Q. Do you believe that that document is one
14 of the -- one of the pages that you reviewed from
15 Intermountain Gas in March 2012?
16 A. I could not confirm that this is part of
17 Intermountain Gas' documents.
18 Q. Okay.
19 A. But it was part of the documents
20 provided.
21 Q. Part of the documents provided to who?
22 A. To Sheila and First Rate with --
23 I believe it goes with this.
24 MR. ANDERSON: Tell us what it is.
25 MR. HAMAN: What exhibit are you holding?

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1 THE WITNESS: SPOA 002457, but I'm not
2 confident.
3 MR. ANDERSON: And which exhibit do you have
4 in your hand?
5 THE WITNESS: 137-A.
6 MR. HAMAN: Thank you.
7 THE WITNESS: Does that help?
8 Q. (BY MR. CLARK) If I heard you correctly,
9 you said you didn't know whether that was from
10 Intermountain Gas, that document that I just handed
11 you?
12 A. That's correct.
13 Q. But it -- you believe it was one of the
14 documents that you provided to First Rate Property
15 Management in March 2012.
16 Is that correct?
17 A. It appears to be, yes.
18 Q. Okay.
19 MR. ANDERSON: We better mark it then.
20 MR. CLARK: Better mark it --
21 MR. HAMAN: 137-C.
22 Well, why don't we do it on a break. We
23 know where we're at. That's going to be 137-C.
24 Let's just do it on a break and keep going.
25 MR. CLARK: Okay.

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1 Q. (BY MR. CLARK) Let's go back to
2 Exhibit 53 for me.
3 A. 53?
4 Q. 53.
5 Do you know who actually put this
6 document in final form -- in the final format that
7 it's in today, Exhibit 53?
8 MR. ANDERSON: I'm going to object. Are you
9 saying who prepared Exhibit 53?
10 MR. CLARK: Correct.
11 MR. ANDERSON: Thank you.
12 THE WITNESS: My understanding is Sheila
13 prepared it.
14 Q. (BY MR. CLARK) Did you receive a copy of
15 the carbon monoxide procedures sometime in
16 March 2012, this Exhibit 53?
17 A. I believe so.
18 Q. Do you recall when you received a copy?
19 A. I could be wrong, but it was the 22nd or
20 might have been the -- the evening of the 21st.
21 Q. Did you receive a copy of 53,
22 Exhibit 53, via e-mail or was it handed to you in a
23 meeting?
24 A. It was via e-mail.
25 Q. Okay. And did you review Exhibit 53?

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[30] (Pages 96 to 99)

1 A. Yes.
 2 Q. Were you asked to review Exhibit 53 by
 3 First Rate Property Management?
 4 A. I don't remember if it was asked or not.
 5 Q. Were you asked to approve the carbon
 6 monoxide procedures listed in Exhibit 53?
 7 A. I don't believe we were asked to approve
 8 them either.
 9 Q. Okay. And I say "you." I mean the
 10 Sagecrest Board of Directors.
 11 A. Board, yeah.
 12 Q. You don't believe that First Rate
 13 Property Management asked you to approve these
 14 carbon monoxide procedures?
 15 A. I do not believe so.
 16 Q. So as you sit here today, you were not
 17 involved in taking the information that's in
 18 Exhibit 53 and formatting it and putting it in the
 19 form that it's in in 53 -- in Exhibit 53?
 20 A. The way you phrased the question --
 21 Q. Did --
 22 Were you involved in drafting the
 23 document as -- in Exhibit 63 -- 53?
 24 MR. HOWELL: Asked and answered.
 25 THE WITNESS: There was a meeting --

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1 Q. (BY MR. CLARK) Okay.
 2 A. -- that the other documents were
 3 produced. We all discussed them all, and that is
 4 the result.
 5 Q. Okay. Who -- who created the result, in
 6 using your words?
 7 A. I understand Sheila Thomason, Sheila
 8 did.
 9 Q. Okay.
 10 A. That was my understanding.
 11 Q. Okay. Were these criteria based on the
 12 information you provided or by information that
 13 First Rate Property Management provided, if you
 14 know?
 15 A. From what I recall from the meeting, it
 16 was both.
 17 Q. What information did First Rate Property
 18 Management provide with regard to carbon monoxide
 19 testing procedures?
 20 A. Their input and ideas and -- and
 21 their -- what -- the information they had.
 22 I -- I don't know that they provided any
 23 document -- documents.
 24 Q. Okay. Well, give me an idea of what
 25 information First Rate Property Management

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1 provided.
 2 A. Well, what steps to take. How --
 3 Steps 1, 2, 3.
 4 MR. ANDERSON: When you say, "1, 2, 3," you
 5 looked down at a document.
 6 What are you looking at or doing?
 7 THE WITNESS: Well, I was just going over an
 8 example of what steps to take in what order.
 9 Q. (BY MR. CLARK) Okay. So --
 10 A. I -- I --
 11 All the information that we had went
 12 into a pot. Everybody discussed it. We
 13 roundtabled it; we talked about it. We all left.
 14 The next day or the following day, the
 15 21st or 22nd, the information came out.
 16 Q. Okay. Well, to use your explanation,
 17 who took the information out and made -- made this
 18 Exhibit 53?
 19 A. My understanding was Sheila.
 20 Q. Okay. Who at the meeting that you
 21 referred to in your answer previously was at the
 22 meeting in March of 2012?
 23 MR. ANDERSON: March 20th, 2012?
 24 MR. CLARK: I just said March of 2012.
 25 MR. ANDERSON: Right. Maybe if we're --

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1 Who knows if there were other meetings.
 2 Q. (BY MR. CLARK) Okay. The March 20th,
 3 2012, meeting you just referred to.
 4 A. It was myself, Tara, Sheila, and I don't
 5 believe -- I can't recall anybody else.
 6 Q. Okay. What experience did you have
 7 in -- on March 22nd of 2012 regarding testing --
 8 carbon monoxide testing procedures?
 9 A. What experience?
 10 Q. Correct.
 11 A. I would have to say none.
 12 Q. Okay. What experience did you believe
 13 that either Sheila or Tara had regarding carbon
 14 monoxide testing on March 22nd?
 15 A. They said they had been trained by
 16 Intermountain Gas and Express.
 17 Q. Okay. Are you telling me that you
 18 believe the carbon monoxide procedures in
 19 Exhibit 53 are the -- exemplify the procedures that
 20 Intermountain Gas taught Tara?
 21 MR. HOWELL: Objection; form.
 22 THE WITNESS: I have no idea.
 23 Q. (BY MR. CLARK) Did Tara say, "Hey, these
 24 are the procedures that the -- that I was taught by
 25 Intermountain Gas. That's why I'm suggesting that

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[31] (Pages 100 to 103)

1 A. Agreeable.
 2 Q. If you answer a question that I ask of
 3 you, I'm going to proceed with the understanding
 4 that you understood my question.
 5 Also agreeable?
 6 A. Agreeable.
 7 Q. I want to go back to Exhibit 56 for just
 8 one minute, if I could. Mr. Palmer was asking you
 9 about it. I want to make sure I understand.
 10 Tell me when you're there, sir.
 11 A. There.
 12 Q. Okay. And I want to focus with you for
 13 a moment or two on the second page.
 14 I understood your testimony, just as a
 15 background to this question, that you selected
 16 Mr. Everton? Or did I misunderstand that?
 17 A. I believe the board selected.
 18 Q. And you were involved in that process?
 19 A. Involved in the process, yes.
 20 Q. And were you the one with the
 21 ultimate -- were you the ultimate decider of who
 22 was going to be selected?
 23 A. No. The board was.
 24 Q. Did you recommend Mr. Everton?
 25 A. He's the one that I presented to them.

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1 Q. You presented him? You brought him
 2 forth to the board, correct?
 3 A. Yes.
 4 Q. And did you have discussions with him
 5 before he prepared this Exhibit 56?
 6 A. I believe so.
 7 Q. And what I'm interested in is if you'd
 8 look right below -- well, just above "the fixes,"
 9 in the middle of the page right below what appears
 10 to be, actually, a filter or a piece of equipment.
 11 I actually don't know what it is.
 12 Do you see where it's written, "In an
 13 effort to provide a best-case fix of this issue
 14 without going to the expense of new seal combustion
 15 water heater system, we suggest the following."
 16 Do you see where I read that?
 17 A. Yes.
 18 Q. Did you ask Mr. Everton to come up with
 19 this type of a recommendation?
 20 A. No, I did not.
 21 Q. Did you have any discussion with him
 22 before he prepared this report about him coming
 23 forth with a -- some type of a solution that would
 24 not involve the method that he recommends in the
 25 prior paragraph which is to furnish a sealed

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1 combustion high-efficiency water heater?
 2 A. No, I did not.
 3 Q. Did you have any discussion with him
 4 prior to his preparing and providing you with
 5 Exhibit 56 about anything having to do with the
 6 issue of costs that would be incurred to solve the
 7 problem that you were confronted with?
 8 A. Was the word "cost"?
 9 Q. Costs.
 10 A. No, did not.
 11 Q. Was it a surprise to you then when you
 12 saw that solution that was set forth as a best-case
 13 fix without going to the expense of a new sealed
 14 combustion water heater system?
 15 Did that surprise you when you saw that?
 16 A. I don't recall if it surprised me or
 17 not.
 18 Q. Were you expecting that kind of a
 19 recommendation?
 20 A. I didn't have any expectations on the
 21 recommendation.
 22 Q. Just so I can be clear on this, is it
 23 your testimony that you didn't give any direction
 24 to Mr. Everton as far as how -- or what you were
 25 looking for in terms of a report and

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1 recommendations?
 2 A. That is correct.
 3 Q. I want to go to another subject. I'd
 4 like to have you focus back on the first part of
 5 August of 2011 after you -- after you all at the
 6 POA had received the information that we've seen
 7 here variously today but without going --
 8 I mean, I can go again to the exhibits.
 9 I really don't want to take the time.
 10 Would you agree with me that as of the
 11 first part of August of 2011, you and the other
 12 board members at Sagecrest were aware of what's
 13 being reported to you as a serious potential health
 14 problem with carbon monoxide issues?
 15 A. I believe so.
 16 Q. And what I'd like to know is: When you
 17 were armed with those facts, as the president of
 18 the POA, could you explain to me --
 19 Well, let me start over.
 20 Did you ever as president of the POA,
 21 armed with those facts, consider sending a letter
 22 to all of the owners within the POA alerting them
 23 to the issues and recommending on behalf of the POA
 24 that they immediately replace the water heaters
 25 because of the safety concerns due to carbon

[Page 219]

[60] (Pages 216 to 219)

<p>1 What info are you referring to?</p> <p>2 A. I can't be sure what info I was</p> <p>3 referring to. It's --</p> <p>4 I -- I --</p> <p>5 Q. And then you go on.</p> <p>6 Correct me if I'm wrong, but there seems</p> <p>7 to be a little bit of a disagreement between you</p> <p>8 and Tara because you're saying, "You're correct</p> <p>9 about the 100 PPM as a guideline for water heater</p> <p>10 flue testing," I presume, but it doesn't require</p> <p>11 that it has to be replaced.</p> <p>12 Did Tara want them to be replaced if her</p> <p>13 testing results reflected 100 parts per million?</p> <p>14 A. All I know at this time was that we had</p> <p>15 gotten a call that there was a high test in one of</p> <p>16 our units, and two days later we got a -- a -- the</p> <p>17 e-mail that said, "It's okay."</p> <p>18 Q. Okay.</p> <p>19 A. And I questioned the discrepancy and why</p> <p>20 it's okay two days later, and that is part of that</p> <p>21 discussion.</p> <p>22 Q. Okay. My question is: Was there a</p> <p>23 disagreement between you and Tara regarding</p> <p>24 replacement of water heaters based on testing</p> <p>25 results?</p> <p style="text-align: right;">[Page 316]</p>	<p>1 of that. It was looking at the documentation.</p> <p>2 Q. Prior to November 10th, 2012, did anyone</p> <p>3 provide you what is marked as Exhibit 59? I</p> <p>4 believe 59 is the testing resulting.</p> <p>5 Did you ever see that before the</p> <p>6 incident?</p> <p>7 A. I received that in October.</p> <p>8 Q. Of 2012?</p> <p>9 A. 2012.</p> <p>10 Q. And when you look at that, you'll see</p> <p>11 that 4624 tested at 100 parts per million in March</p> <p>12 of 2012.</p> <p>13 A. And when I received it, I -- I had not</p> <p>14 looked at each number or what the results were.</p> <p>15 Q. You just scanned it?</p> <p>16 A. Just scanned it.</p> <p>17 Q. And you'll see there's various testing</p> <p>18 in March of 2012, testing results with 100 and</p> <p>19 above.</p> <p>20 A. Yes.</p> <p>21 Q. In March of 20 -- or in October of 2012</p> <p>22 when you saw that, did you call for a special</p> <p>23 meeting?</p> <p>24 A. No, I did not.</p> <p>25 Q. In the annual meeting of October 2012,</p> <p style="text-align: right;">[Page 318]</p>
<p>1 In other words, if Tara is saying, "Hey,</p> <p>2 if this comes back at 100, I want that water heater</p> <p>3 replaced," and you're saying, "No."</p> <p>4 Did that happen?</p> <p>5 A. No, I don't believe so.</p> <p>6 Q. Okay. Do you know that in March --</p> <p>7 Let me ask you this: In March of 2012,</p> <p>8 did you know that Apartment 4624 tested at</p> <p>9 100 parts per million --</p> <p>10 A. I did not.</p> <p>11 Q. -- by Tara?</p> <p>12 When did you --</p> <p>13 Have you ever become aware of that until</p> <p>14 right now?</p> <p>15 A. I became aware of that, I believe, in</p> <p>16 October of 2012.</p> <p>17 Q. Okay.</p> <p>18 MR. HOWELL: Of what unit?</p> <p>19 MR. HAMAN: '12.</p> <p>20 Oh, 4624.</p> <p>21 MR. HOWELL: Sorry.</p> <p>22 Q. (BY MR. HAMAN) So in October of 2012,</p> <p>23 you became aware --</p> <p>24 A. Actually, I have to correct that because</p> <p>25 it was through this litigation that I became aware</p> <p style="text-align: right;">[Page 317]</p>	<p>1 did you inform the members of Exhibit 59?</p> <p>2 A. Did I inform them of this --</p> <p>3 Q. Exhibit.</p> <p>4 A. -- paperwork?</p> <p>5 Q. Yes.</p> <p>6 A. I don't believe so.</p> <p>7 Q. Did you inform them with your --</p> <p>8 You said you scanned it. Did you inform</p> <p>9 the members at the annual meeting of what you</p> <p>10 scanned on Exhibit 59?</p> <p>11 A. Excuse me. "Scan" is -- I mean,</p> <p>12 glancing at it, looking at it.</p> <p>13 Q. All right. Did you inform them that you</p> <p>14 received what is known as Exhibit 59?</p> <p>15 A. I do not believe so.</p> <p>16 Q. Did you inform them that you looked at</p> <p>17 it or scanned at it or glanced at it?</p> <p>18 A. I don't believe so.</p> <p>19 Q. As you sit here today, do you have any</p> <p>20 personal knowledge as to whether anyone at</p> <p>21 First Rate or the Sagecrest board ever informed</p> <p>22 Matt Switzer of a potential carbon monoxide problem</p> <p>23 in 4624 prior to November 10th, 2012?</p> <p>24 A. I do not know.</p> <p>25 Q. Exhibit 14 is the notice that has been</p> <p style="text-align: right;">[Page 319]</p>

[85] (Pages 316 to 319)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 15th day of April 2014.



ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.



My Commission Expires: 2-14-17

[Page 457]

4

Subject: Water Heater Needs Replaced ASAP

From: "Sheila Thomason" </O=FRPM/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=SHELIA>

Sent: 7/29/2011 4:44:26 PM

To: "Sheila Thomason" </O=FRPM/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=Shelia>
"hanoverholdings@gmail.com"
<hanoverholdings@gmail.com>; "aire1@pacbell.net"
<aire1@pacbell.net>; "Geneservatius@yahoo.com"
<Geneservatius@yahoo.com>; "calico2640@msn.com"
<calico2640@msn.com>; "takatori1@frontier.com"
<takatori1@frontier.com>; "wmraffdesigns@yahoo.com"
<wmraffdesigns@yahoo.com>; "Raffbeth@yahoo.com"
<Raffbeth@yahoo.com>; "grandmabj@aol.com"
<grandmabj@aol.com>; "cmschwab@aol.com"
BCC: <cmschwab@aol.com>; "jpowell@digitallore.com"
<jpowell@digitallore.com>; "naisaechao0485@yahoo.com"
<naisaechao0485@yahoo.com>; "pursestrings@gmail.com"
<pursestrings@gmail.com>; "janet@parrfamily.com"
<janet@parrfamily.com>; "paul.ryan@marcusmillichap.com"
<paul.ryan@marcusmillichap.com>; "bcoopers6@yahoo.com"
<bcoopers6@yahoo.com>; "dbmeisner@gmail.com"
<dbmeisner@gmail.com>; "bycappa@aol.com"
<bycappa@aol.com>; "jerryehlers@johnlscott.com"
<jerryehlers@johnlscott.com>

Attachments: image001.png; image002.png; image003.png; sagecrest water heaters.docx; water heaters.pdf

The water heaters listed at your properties are allowing carbon monoxide into the apartments at dangerous levels that potentially could cause death to your tenants. Below listed are the levels part per million and toxic symptoms that occur within the specified time frame. Next to the property listed is the concentrated amount of carbon monoxide in your apartment. You can see where your unit falls and the potential hazards as stake. Intermountain Gas has been out to the complex on numerous occasions and shut the service off to several apartments within the last 2 years. The last unit had over 4,000 ppm of carbon monoxide in the unit. Intermountain Gas told us and the tenants they could have died if they were in the apartment much longer. This was very alarming to all of us especially since this could be happening in any of the units. Carbon monoxide doesn't have a smell so isn't easily detected. This specific tenant also smell gas so they called myself at which time I instructed them to call Intermountain Gas immediately for testing. Intermountain Gas has been willing to work with us to get proper testing done on all of the water heaters for the properties that we manage. They weren't willing to do this themselves but showed Express Plumbing what equipment was needed and then went through some units with us to show how to properly test. Express Plumbing has been involved and done extensive research on different water heaters. Attached

is a letter from them explaining the situation. I have also attached photos of some of the water heaters that we have already replaced showing the cause and the damage that has been done to the water heaters themselves. We have already attempted to clean some of the water heaters but the internal damage is too severe they can no longer be reinstalled.

200 ppm- Slight headache, tiredness, dizziness, nausea after 2-3 hours

400 ppm- Frontal headaches within 1-2 hours, life threatening after 3 hours

800 ppm- Dizziness, nausea and convulsions within 45 minutes. Unconsciousness within 2 hours. Death within 2-3 hours.

1,600 ppm- Headache, dizziness and nausea within 20 minutes. Death within 1 hour.

3,200 ppm- Headache, dizziness and nausea within 5-10 minutes. Death within 30 minutes.

6,400 ppm- Headache, dizziness and nausea within 1-2 minutes. Death within 10-15 minutes.

#1612- 2,200 ppm
ppm

#3312- 910

#4412- 2,200 ppm

#5411- 47 ppm but the top of the water heater is deformed-due to explode soon

#2311- 650 ppm
ppm
2,180 ppm

#3411-1,200

#4424- 450 ppm

#5511-

#2711- 2,700 ppm
ppm
2,067 ppm

#3424- 2,126

#4712- 2,400 ppm

#5523-

#2723- 2,108 ppm
ppm

#3923- 550

#4723- 300 ppm

#2923- 2,200 ppm
ppm

#4123- 2,319

#4823- 300 ppm

#3224- 2,222 ppm
ppm


#4211- 2,319

#5024- 450 ppm

#3311-2,300 ppm
ppm


#4411- 2,201

#5323- 2,082 ppm



We are working on long term solutions so the same problem doesn't happen in another 5 years. You will be notified once we have a solid plan. Either way they do need to be replaced for the safety of the tenants. The initial design and location of the water heaters was a poor choice on the builders end. We are not replacing the water heaters with the same set up but we are looking at altering the environment around them (per code) to guarantee longevity of the new water heaters and safety of the tenants. I fully understand that this is a large expense. Some of you have multiple water heaters that need to be replaced. Unfortunately there isn't any other options. As owners you are required to provide a safe living environment. Since there are a large amount of water heaters that need replaced we are able to get a discount install of \$650 each. They have already purchased 20 water heaters to lock in this rate. This will include four new supply lines and a new belly pan under the water heater. We have attempted to collect from the builders insurance company for multiple issues at the complex but have been unsuccessful.

We will be contacting all of the tenants in danger letting them know we have requested the water heater to be replaced. I will provide them with safety precautions and a carbon monoxide detector if requested until the water heaters can be replaced starting the beginning of next week.



I will need a written response from each of you for documentation purposes. I will also follow up with a phone call to ensure you have received and read this email. Please let me know which building you own and if I have approval to replace your water heater(s) listed. If you prefer to use a different vendor I would like that information with an approximate date to inform the tenant. Please be sure that your vendor installs the proper type of water heater.

Please feel free to call myself on the number below or Jon (POA Pres) at 925-228-7000 for any further questions you may have.

Thanks,

Sheila Thomason



First Rate Property Management, Inc. CRMC®

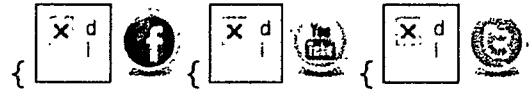
Maintenance Supervisor

208-577-5201 direct line



208-321-1901 fax

www.frpmrentals.com



click **HERE** to complete our Maintenance survey

click **HERE** to complete our Owner survey

J



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3405 Wilbur Ma... (1)
 Allegro Roadru... (34)
 BAM - Bay Area... (10)
 Bellingham rea...
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 Book of Fins (203)
 bosie real est... (40)
 FRPM (520)
 Gold Nuggets -... (13)
 investments (164)
 John Sonmez - ...
 jokes (43)
 MV
 ON LINE BILL P... (7)
 Oregon Propert... (4)
 park pointe (49)
 Reno propety (16)
 Sagecrest-Mer... (25)
 SC - Notices (53)
 V - J RV camp... (5)
 VK-JK Travels (3)

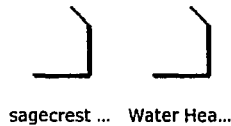
Water Heater Tracking Sheet

Thursday, July 28, 2011 5:59 PM

From: "Sagecrest" <sagecrest@FRPMRENTALS.COM>

To: "VJK" <aire1@pacbell.net>

Cc: "Sheila Thomason" <Sheila@FRPMRENTALS.COM>, "Tony Drost" <Tony@FRPMRENTALS.COM>, "Lizz Loop" <Lizz@FRPMRENTALS.COM>, "Marie Swanson" <Marie@FRPMRENTALS.COM>, ben.expressplumbing@gmail.com, "Sagecrest" <sagecrest@FRPMRENTALS.COM>
 2 Files (43KB) | Download All



sagecrest ... Water Hea...

No virus threat detected File: sagecrest water heater.docx [Download File](#)

<<Water Heater Tracking Sheet.xlsx>> Hi Jon. We are done with the water heater inspections and there are 24 water heaters that have very high carbon monoxide levels and need to be replaced and 2 I think we might be able to clean for a total of 26. I understand that we need to have a plan with long-term solutions but until that is figured out what do you suggest we do until then? I have 10 carbon monoxide detectors that we can put in some of these units and purchase more for the rest if you'd like. When I purchased the 10 it was with the intention of moving them from one unit to the other while we got approval for replacement. I was then thinking of leaving them at the units that were

Chat & Mobile Text

I am Offline

"borderline"

so to speak so there would be a safety precaution for when their carbon monoxide levels get too high, which they will eventually do in a matter of time. Later we found out there is more to it than just replacing the water heaters. My only issue is if Intermountain Gas were to come out and check these they would shut them down. No questions asked. I don't think that these 26 water heaters should even be left on. I don't think I could live with myself if something happened to one of these tenants or their children knowing this information. I know if this was happening in my living environment I would like to know. These levels are deadly.

After completing the inspections today and reviewing the spreadsheet with Ben we feel the most important issue is cleanliness around the water heater. Since they are in the same room as the dryers the lint, dust, dirt, hair, whatever flies all around the room as soon as the dryers turn on. According to Ben the floor around the water heaters and inside the belly pans were just as dirty as the top of the water heaters and supply lines. We think it would be a good idea to have these areas checked and/or cleaned when the furnace filters are changed every 3 months. I don't think that installing a 2 foot wall between the two would really do that much good to justify the cost. Most of these particles I picture flying around when dryers are turned on and settling on either side of the 2 ft wall. I still need to speak to a building inspector as we discussed earlier today to see if this would be to code and if specific materials need to be used. I will do this tomorrow.

Ben is sending me the information on the water heaters that they have been installing. They do have a "filter" like the current water heaters (AoSmiths) but the air is pulled through vents on the side of the water heater, then down to the bottom, and up through the filter/screen, which is the same size as the filter/screen on the outside of the water

heater
that the air is originally pulled from to start. Hope that makes sense.
The holes in the screen are very large compared to the current AOSmiths.
It would be easy to see if dirt/debris is clogging the outside vent of the water heater and wipe clean. I will forward the information to you
so you can see the specs on the water heater when I get it tonight or tomorrow. I have also attached a word doc I received from Ben where he explains the issues he has seen in the past and currently sees now with his professional opinion. Maybe we can send something of the sort to the owners so they are informed. I think it would need to be put in more generic terms in order for some of our owners to understand. He is also going to send me photos he has of the different things he sees with these water heaters for better understanding and a visual (I need to see things to get a full understanding sometimes). We have put two calls into Intermountain Gas today asking when we can expect their letter to send to the owners as well.

Since there is also a problem with every floor plan, including the C floor plan (which has the water heaters in a separate closet than the washer and dryer) there are venting issues as well. Once I speak to a building inspector I can ask where we are allowed to install extra vents within the apartments to increase the oxygen in the area and get prices. I know code doesn't allow you to pull air from a bedroom but I would think any other room would be ok? Again I think the cleanliness of the water heater area is the key factor. Dust, hair from animals, dirt, whatever can accumulate in any room if it's not cleaned regularly. We really need to focus on them in the winter time since the water heaters work double time + to feed the furnace. I'm sure the potential damage triples during these months.

Since there are 24 for sure that need to be replaced they can be done for \$650 each.

Well, let me know what you think. I'll be calling shortly to
make sure
you received the email. Thanks!

Sheila

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6

To whom it may concern:

The water heater problem at Sagecrest Apartment has recently been brought to my immediate attention. Sagecrest Apartments has been one of hundreds of accounts for over a year. With the development of recent multiple incidences with multiple water heaters, I have been investigating the bigger solution to the significant problems. Since Sagecrest has been on my account, we have replaced countless numbers of thermal couplings, issues with carbon monoxide and blown up water heaters or red-tagged water heaters. Alone, these would be regular incidents without any alarm, but together these issues alerted me to a bigger issue to investigate since this has been an ongoing issue with Sagecrest Apartments and none of my other accounts. During my investigation I have uncovered some alarming issues that as a plumber, I would recommend immediate action. I am recommending a long term solution, rather than the short term fix that has been repeated for several years.

Since 2002, water heaters have been manufactured as a sealed combustion chamber with an air intake filter and a flame arrestor built into the base. Presently all water heaters have to be a sealed combustion chamber with a non-removable filter to meet code standards. Prior to this, water heaters were open chambers and hadn't changed much since 1889. An open chamber water heater would last 10 to 15 years with very little maintenance, a home owner could re-light or do maintenance easily accessible door. The new water heaters with sealed combustion chambers have two bolts and gaskets to seal the door down, allowing no air to enter, except through the designated filter. These sealed combustion chambers are safer and more energy efficient for two main reasons; any potential gas leak would be sealed within the water heater and it allows for an oven-like chamber to heat the water using less gas and energy. This sealed combustion chamber water heater is harder to gain access to the mechanics to allow for professional maintenance. On most of these models, there is a one inch view port for inspection of the burner that pulls air through the intake filter at the bottom of the heater and to identify the condition of the pilot assembly. This filter has to be clean to allow for the maximum amount of air to flow through allowing efficient burning.

The water heaters at Sagecrest Apartments have had problems from day one for one reason or another. One problem that has been an issue is the drain pans that are under the water heaters to stop water leaks from causing damage to your apartment have been cut up or removed to gain access to the filter for maintenance. By removing or cutting up drain pans this has the potential to cause property damage because all water heaters will leak at one point. The main problem in two out of three floor plans at Sagecrest is that the dryer and washer are located next to the water heaters, which are all located in a tiny sealed off room. As the dryer runs, it produces lint and dust at the same time, therefore pulling and pushing a lot of air around this compacted space. This lint and dust clogs the filter on the bottom of the water heater, which does not let the extra gas and heat escape through the exhaust pipe. As the dryer is working it suppresses the air to the water heater and the sealed combustion chamber gets hotter and hotter until the tank erupts at the seams or melts the metal in the chamber. In my 12 years of plumbing, I have never seen a new water heater burst at the seam or melt metal in the chamber. From my investigation I have concluded that with the filter clogged with lint or dust for an extended amount of time it causes the flame and gas to not escape properly and collect within the water heater chamber. In turn this causes extreme heat which deforms the filter by melting

it and causing further inability to obtain air through it. These water heaters are the ones that have been tagged by the gas company due to the unsafe level of carbon monoxide that is being produced.

Although not all water heaters have been tagged, the potential for the same situation to happen is seen in all floor plans. These water heaters are producing carbon monoxide levels comparable to the average car producing 2100 parts per million (ppm) of carbon monoxide in a closed room. At these levels of carbon monoxide, you would experience headache, dizziness and nausea within 5-10 minutes preceding death within 30 minutes. An average new water heater will safely produce 10 PPM of carbon monoxide, at a safe healthy level. The water heaters at Sagecrest with a clogged filter and a combustion chamber that is damaged are producing 2000 to 3000 PPM of carbon monoxide through the exhaust vent. This is a serious health problem. Combined with a clogged filter and a room occupied by a dryer that also consumes air, the water heaters are working twice as hard to obtain air, causing more maintenance and damage than normal wear and tear. Not to mention the carbon monoxide being emitted into the apartment because as the dryer is pulling air from the exhaust vent for the water heater, it is eliminating the carbon monoxide to properly be pushed out through the exhaust vent. Instead the carbon monoxide is being emitted directly into the apartment, at potentially deadly levels of over 2000 PPM. The maximum allowable concentration for a continuous exposure to carbon monoxide in an eight hour period is 50 ppm. At Sagecrest some apartments were tested resulting in levels forty times higher than the maximum allowable concentration for continuous exposure to carbon monoxide. I would strongly recommend that these issues be solved before any tenants suffer health problems or death.

7



Commerce Centre <ccbussinespark@gmail.com>

CO detectors

19 messages

sagecrest <sagecrest@frpmrentals.com>

Thu, Oct 11, 2012 at 8:55 AM

Reply-To: sagecrest <sagecrest@frpmrentals.com>

To: Commerce Centre <ccbussinespark@gmail.com>

Cc: Lizz <Lizz@frpmrentals.com>, Tony <tony@frpmrentals.com>

Hi Jon,

After yesterdays events I would like to have Chris go into every unit and check and make sure the CO detectors that we installed are in working condition. The units that do not have CO detectors I would like him to install one. Talking with the fire department yesterday they said that the detectors that we gave the tenants when this first happened is not enough to cover our end. He said the tenants may not have even put the batteries in and installed them properly. He said if they didnt then it would not be the tenants fault it would be our responsibility to make sure they are installed and working property. He recommended installing the CO detectors that we have been installing in every unit. I would really like to do this to take the heat off us. I talked to Chris, he would charge \$25 per building to make sure they are all good. If there is a unit that needs a CO detector it would be \$55 for the detector and \$25 for installing it. Please let me know your thoughts.

*Tara Gaertner**Sagecrest Apartments**(208) 514-4304**frpmrentals.com*

Commerce Centre <ccbussinespark@gmail.com>

Thu, Oct 11, 2012 at 1:40 PM

To: sagecrest <sagecrest@frpmrentals.com>

Cc: Lizz <Lizz@frpmrentals.com>, Tony <tony@frpmrentals.com>

We will discuss this further, I will talk to the board and see how the board wants to proceed.

Virginia and Jon

[Quoted text hidden]

Commerce Centre <ccbussinespark@gmail.com>

Mon, Oct 15, 2012 at 9:04 AM

To: sagecrest <sagecrest@frpmrentals.com>

Bcc: Tony Drost <Tony@frpmrentals.com>

Tara, please elaborate on the following question — According to your discussion with the fire marshal, "....the detectors that we gave the tenants....."; when was the decision made and by whom to give tenants CO detectors and have tenants install them?

Virginia and Jon

On Thu, Oct 11, 2012 at 8:55 AM, sagecrest <sagecrest@frpmrentals.com> wrote:
[Quoted text hidden]

sagecrest <sagecrest@frpmrentals.com>
Reply-To: sagecrest <sagecrest@frpmrentals.com>
To: Commerce Centre <ccbusinesspark@gmail.com>

Mon, Oct 15, 2012 at 9:19 AM

It was last summer when we went through with Express and the Gas company, the ones with high readings that we couldnt replace the same day, we went and got the ones in the packages and put them in the units for the tenants over night until we could get their water heater replaced. That is the only time we give them out, when there is a reading detected but the water heater is unable to get tested right away. I would just like to get this taken care of once and for all so I'm not put in the middle of it. I dont think it should be optional to have Chris go in and make sure every unit has a working CO detector.

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com

[Quoted text hidden]

Commerce Centre <ccbusinesspark@gmail.com>
To: sagecrest <sagecrest@frpmrentals.com>
Bcc: Tony Drost <Tony@frpmrentals.com>

Mon, Oct 15, 2012 at 1:02 PM

May we inquiry who 'we' is?

Virginia and Jon

[Quoted text hidden]

sagecrest <sagecrest@frpmrentals.com>
Reply-To: sagecrest <sagecrest@frpmrentals.com>
To: Commerce Centre <ccbusinesspark@gmail.com>

Mon, Oct 15, 2012 at 1:13 PM

Myself, Missy and Sheila.

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com

----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>
To: "sagecrest" <sagecrest@frpmrentals.com>

[Quoted text hidden]

Commerce Centre <ccbusinesspark@gmail.com>

Mon, Oct 22, 2012 at 3:10 PM

To: sagecrest <sagecrest@frpmrentals.com>

Tara, did you test for CO with our tester in the unit when Molly complained? and when? When you talked to the fire marshal, did you discuss the procedures put in place in March 2012?

Virginia and Jon

On Thu, Oct 11, 2012 at 8:55 AM, sagecrest <sagecrest@frpmrentals.com> wrote:

[Quoted text hidden]

sagecrest <sagecrest@frpmrentals.com>

Mon, Oct 22, 2012 at 3:14 PM

Reply-To: sagecrest <sagecrest@frpmrentals.com>

To: Commerce Centre <ccbusinesspark@gmail.com>

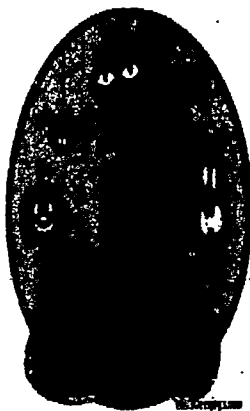
We had tested in that unit the Saturday before and tested zero. I didnt think to test while everyone was there because Intermountain Gas and the fire department was there. I didnt have a chance to tell them about the procedures. I talked to the fire marshal and asked him why he needed to come out and inspect. He said it was something they are supposed to do every year. He said it had nothing to do with the incident that happened, he was just to do an exterior inspeciton. I told him we have Taylor bros service the fire extinguishers yearly and that is coming up at the end of November. He said that was great and there should be no problems. He didn't ask me anything about the incident after it occurred.

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com



----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>

To: "sagecrest" <sagecrest@frpmrentals.com>

[Quoted text hidden]

Commerce Centre <ccbusinesspark@gmail.com>

Mon, Oct 22, 2012 at 3:18 PM

To: sagecrest <sagecrest@frpmrentals.com>

What Sat. Date please, was that at the time of filter changes only? Did you have a conversation with the fire marshal after the day of the incident or was the only conversation the day of the incident?

Virginia and Jon

[Quoted text hidden]

sagecrest <sagecrest@frpmrentals.com>

Mon, Oct 22, 2012 at 3:21 PM

Reply-To: sagecrest <sagecrest@frpmrentals.com>

To: Commerce Centre <ccbusinesspark@gmail.com>

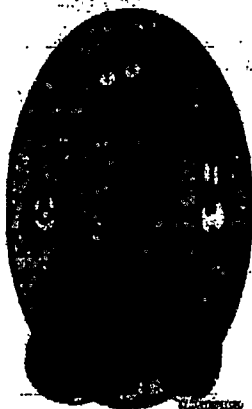
Saturday the 6th. I called him the day after per his request. We only talked about the exterior inspection and I confirmed with him that the inspection had no correlation with the incident in 3324. He said nothing to me regarding CO detectors or anything regarding the interior of units.

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com



----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>

To: "sagecrest" <sagecrest@frpmrentals.com>

Sent: 10/22/2012 4:18:32 PM

Subject: Re: Re[2]: CO detectors

What Sat. Date please, was that at the time of filter changes only? Did you have a conversation with the fire marshal after the day of the incident or was the only conversation the day of the incident?

[Quoted text hidden]

Commerce Centre <ccbusinesspark@gmail.com>

Mon, Oct 22, 2012 at 3:24 PM

To: sagecrest <sagecrest@frpmrentals.com>

Thank you, are the procedures from Mar 2012 being implemented and followed?

Virginia and Jon

[Quoted text hidden]

sagecrest <sagecrest@frpmrentals.com>

Mon, Oct 22, 2012 at 3:32 PM

Reply-To: sagecrest <sagecrest@frpmrentals.com>

To: Commerce Centre <ccbusinesspark@gmail.com>

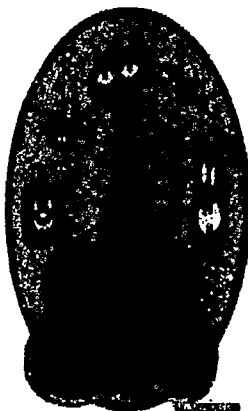
Yes.

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com



----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>

To: "sagecrest" <sagecrest@frpmrentals.com>

[Quoted text hidden]

Commerce Centre <ccbusinesspark@gmail.com>

Mon, Oct 22, 2012 at 3:45 PM

To: sagecrest <sagecrest@frpmrentals.com>

How many units have hardwired CO detectors installed in the hallway and how many do not, please?(Need to know this answer now.)

Would you provide a list or excel sheet - maybe the filter change sheet would work. thanks

Virginia and Jon

[Quoted text hidden]

sagecrest <sagecrest@frpmrentals.com>
Reply-To: sagecrest <sagecrest@frpmrentals.com>
To: Commerce Centre <ccbusinesspark@gmail.com>

Mon, Oct 22, 2012 at 3:46 PM

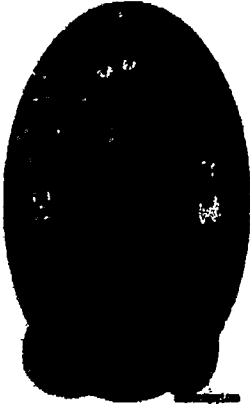
I cant provide that answer right now, I will have to do some digging, I will start right now and get it to you as soon as I can.

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com



----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>

To: "sagecrest" <sagecrest@frpmrentals.com>

[Quoted text hidden]

sagecrest <sagecrest@frpmrentals.com>
Reply-To: sagecrest <sagecrest@frpmrentals.com>
To: Commerce Centre <ccbusinesspark@gmail.com>

Mon, Oct 22, 2012 at 3:59 PM

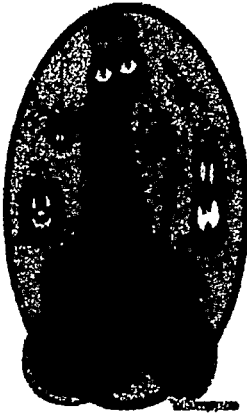
I can stay until I have this finished if you like or I can have it to you tomorrow by noon?

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com



----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>
To: "sagecrest" <sagecrest@frpmrentals.com>
Sent: 10/22/2012 4:45:20 PM
Subject: Re: Re[6]: CO detectors

How many units have hardwired CO detectors installed in the hallway and how many do not, please?(Need to know this answer now.)

[Quoted text hidden]

[Quoted text hidden]

Commerce Centre <ccbusinesspark@gmail.com>
To: sagecrest <sagecrest@frpmrentals.com>

Mon, Oct 22, 2012 at 4:52 PM

So per our phone conversation, you will continue tomorrow do to the process of going thru each unit work orders and there is not a list or tabulation of which units have hardwired CO detectors and which do not. In Mar 2012 we discussed setting up a tracking system similar to the WH tracking form, right?

The association is not in a position to pay overtime to answer your question.

Another question is you stated Missy, Sheila and yourself set up this procedure ".....last summer...." would you clarify what summer you are talking about? There is a tracking sheet for WH, right?

Virginia and Jon

[Quoted text hidden]

sagecrest <sagecrest@frpmrentals.com>
Reply-To: sagecrest <sagecrest@frpmrentals.com>
To: Commerce Centre <ccbusinesspark@gmail.com>

Tue, Oct 23, 2012 at 10:30 AM

Attached is the spreadsheet. My answers to your questions are below in red. Please let me know if there is anything else you need.

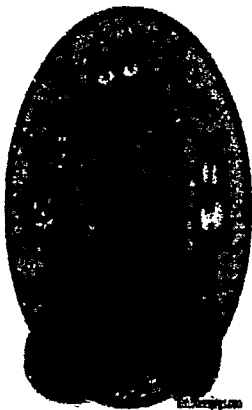
Thanks!

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com



----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>

To: "sagecrest" <sagecrest@frpmrentals.com>

Sent: 10/22/2012 5:52:49 PM

Subject: Re: Re[8]: CO detectors

So per our phone conversation, you will continue tomorrow do to the process of going thru each unit work orders and there is not a list or tabulation of which units have hardwired CO detectors and which do not. In Mar 2012 we discussed setting up a tracking system similar to the WH tracking form, right? To my understanding this was for the units that we had given the battery ran detectors to until the water heater was able to be fixed. There is a list now and I will continue to update this list when we install CO detectors.

The association is not in a position to pay overtime to answer your question.

Another question is you stated Missy, Sheila and yourself set up this procedure ".....last summer...." would you clarify what summer you are talking about? There is a tracking sheet for WH, right? There is a tracking sheet for the water heater, I just added the CO detectors to this and now they are together on one form. The summer of 2011 when all this started. You, Lizz and Tony were made aware of what the process was regarding giving tenants the battery operated detectors until the water heater was either replaced or cleaned.

[Quoted text hidden]

 CO Detectors & Water heater replacements.xlsx
23K

Commerce Centre <ccbusinesspark@gmail.com>

To: sagecrest <sagecrest@frpmrentals.com>

Tue, Oct 23, 2012 at 10:41 AM

This appears to be the filter change, please tell us where to find the co info. On this sheet.

Virginia and Jon

[Quoted text hidden]

sagecrest <sagecrest@frpmrentals.com>

Tue, Oct 23, 2012 at 10:44 AM

Reply-To: sagecrest <sagecrest@frpmrentals.com>

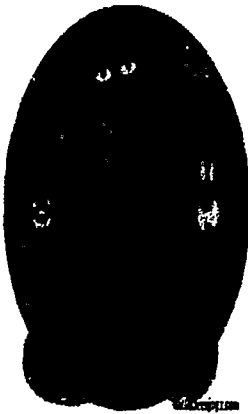
To: Commerce Centre <ccbusinesspark@gmail.com>

Tara Gaertner

Sagecrest Apartments

(208) 514-4304

frpmrentals.com



----- Original Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>

To: "sagecrest" <sagecrest@frpmrentals.com>

[Quoted text hidden]



CO Detectors & Water heater replacements.xlsx

17K

Unit #	Floor Plan	Has CO Detector	Water heater replaced
1011	C		
1012	C		
1023	C	X	
1024	C	X	

1111	A		
1112	A		
1123	A		
1124	A		

1311	C		
1312	C		Replaced 1/18/12
1323	C		
1324	C	X	Replaced 1/23/12

1511	C	X	Replaced 11/29/11
1512	C	X	
1523	C	X	
1524	C	X	

1611	A		Replaced 8/1/11
1612	A		Replaced 8/1/11
1623	A	X	Replaced 8/1/11
1624	A		Replaced 8/1/11

1711	C		
1712	C	X	
1723	C		
1724	C		Replaced 1/9/12

1811	A	X	Replaced 7/19/11
1812	A	X	Replaced 8/1/11
1823	A		Replaced 8/1/11
1824	A		Replaced 8/1/11

1911	C		Replaced 3/19/12
1912	C		Replaced 12/1/11
1923	C		Replaced 6/18/12
1924	C		Replaced 12/1/11

2011	A		
2012	A	X	
2023	A	X	
2024	A	X	

2111	A	X	Replaced 7/21/12
2112	A		Replaced 5/11/11
2123	A		
2124	A		Replaced 6/26/12

2211	C		Replaced 6/25/12
2212	C		
2223	C		
2224	C		

2311	C		Replaced 8/1/11
2312	C	X	
2323	C		
2324	C		Replaced 4/9/12

2411	C	X	
2412	C		
2423	C		
2424	C		

2511	C		Replaced 5/14/12
2512	C		
2523	C	X	Replaced 6/3/12
2524	C		

2711	A	X	Replaced 8/3/11
2712	A	X	Cleaned 8/3/11
2723	A	X	Replaced 8/3/11
2724	A	X	Replaced 1/26/12

2811	C	X	Replaced 9/16/11
2812	C	X	Replaced 11/10/10
2823	C		
2824	C		

2911	C	X	
2912	C		
2923	C		Replaced 8/3/11
2924	C	X	Replaced 1/23/12

3011	B		
3012	B		
3023	B	X	Replaced 3/9/12
3024	B		

3111	C		
3112	C	X	
3123	C		Replaced 10/1/12
3124	C		

3211	C		
3212	C	X	
3223	C	X	
3224	C	X	Replaced 8/9/11

3311	A	X	Replaced 8/18/11
3312	A	X	Replaced 8/18/11
3323	A	X	Cleaned 8/18/11
3324	A	X	Replaced 10/10/12

3411	C	X	Replaced 8/3/11
3412	C		
3423	C		
3424	C		Replaced 8/3/11

3511	C		Replaced 3/9/12
3512	C		
3523	C	X	

3524	C		Replaced 4/21/12
------	---	--	------------------

3611	C		
3612	C		
3623	C		
3624	C		

3711	C		
3712	C	X	Replaced 4/13/11
3723	C		
3724	C	X	

3811	C		
3812	C		
3823	C		
3824	C		

3911	B	X	
3912	B	X	
3923	B	X	Replaced 8/4/11
3924	B	X	Replaced 3/12/12

4011	C		Replaced 2/3/12
4012	C		
4023	C		
4024	C		

4111	A	X	
4112	A		Replaced 3/22/12
4123	A		Replaced 8/9/11
4124	A	X	

4211	C		Replaced 8/9/11
4212	C		Replaced 6/13/12
4223	C		
4224	C	X	Replaced 11/18/11

4311	B	X	
4312	B	X	
4323	B	X	Replaced 11/18/11
4324	B	X	

4411	A		Replaced 8/1/11
4412	A		Replaced 8/3/11
4423	A		
4424	A		Replaced 8/3/11

4511	A		
4512	A		Replaced 3/12/12
4523	A		
4524	A		Replaced 3/5/11

4611	B		
4612	B		
4623	B	X	Replaced 1/7/11
4624	B		

4711	B	X	Replaced 10/6/10
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4712	B	X	Replaced 8/3/11
4723	B	X	Replaced 8/3/11
4724	B	X	

4811	A	X	
4812	A		Replaced 10/1/11
4823	A		Replaced 6/3/11
4824	A		

4911	A		
4912	A		Replaced 3/6/12
4923	A		Replaced 12/13/11
4924	A		

5011	B		Replaced 7/19/11
5012	B		Cleaned 9/1/11
5023	B		
5024	B	X	Replaced 8/1/11

5211	B		
5212	B		Replaced 11/21/11
5223	B		Replaced 9/25/12
5224	B		

5311	C	X	
5312	C	X	
5323	C	X	Replaced 8/3/11
5324	C		

5411	C		Replaced 10/31/11
5412	C		
5423	C		
5424	C		

5511	B		Replaced 8/3/11
5512	B	X	
5523	B		Replaced 8/3/11
5524	B	X	

5611	C		
5612	C		
5623	C		Replaced 5/18/12
5624	C		

5711	C	X	Replaced 1/10/12
5712	C		
5723	C	X	Cleaned 5/11/12
5724	C		Replaced 12/14/11

#58
Unit box that is purple= we don't manage this building

8

From: 'newsagecrest' <sagecrest@frpmrentals.com>
To: Carl<tara@frpmrentals.com>
Sent: Friday, December 07, 2012 8:56 AM
Subject: Fw: Re: Fw: Good Morning! Questions???

----- Forwarded Message -----

From: "sagecrest" <sagecrest@frpmrentals.com>
To: "Lizz" <lizz@frpmrentals.com>
Sent: 5/21/2012 1:36:20 PM
Subject: Re: Fw: Good Morning! Questions???

Wow. I have a whole lot to say about this but I just did renewals and I'm tired of typing and tired of him. I dont even care. Whatever, we suck Jon. You're right. We cant do anything right. I have an attitude towards him because he's a fucking asshole and created a hostile work environment. And he's stupid and ignorant. Go ahead and tell him that. He can have attitude towards us and can talk to us however he wants. That's cool. Whatever.

Tara Gaertner
Sagecrest Apartments
(208) 514-4304
frpmrentals.com

----- Original Message -----

From: "Lizz" <lizz@frpmrentals.com>
To: "Sagecrest" <Sagecrest@frpmrentals.com>
Sent: 5/21/2012 1:24:51 PM
Subject: Fw: Good Morning! Questions???

I have to reply today so if I call you for questions you will know why. .

No matter what **no responding**. A lot has to do with POA stuff that I have to look up.

Lizz Loop, MPM[®], RMP[®]

General Manager

First Rate Property Management, Inc. CRMC[®]
(208) 577-5202 - direct line

----- Forwarded Message -----

From: "Commerce Centre" <ccbusinesspark@gmail.com>
To: "Lizz" <lizz@frpmrentals.com>
Sent: 5/20/2012 6:04:02 PM
Subject: Good Morning! Questions???

Welcome to Monday morning!!!

Lizz, since the last statement came out, I have concerns and issues about the information provided. We had a conversation on the subject of finding out information after the fact last month, if I remember right,. Here again, I am finding out information and changes without knowledge of them and do not agree with some of them for SC. Little over 2 years ago when starting with FRPM, our conversations covered how SC, as a stand alone complex, would be operated at the direction of the POA board of directors.

FRPM is the association manager and take direction from the board of directors in regard to SC. The POA cannot be run the same as a 4 plex, there are budget constraints and board members who are elected to protect the member's interests in the POA.

Attached is a list of questions, 2 are for our property and 10 for the POA. The last statement brought this to a head, along with a few concerns that should have been handled differently from the board's position.

In managing the POA, we need to work as a team and get the best value for the members of the POA, like getting comparison insurance and lawn care quotes – as well as other services, in order to provide the best value for the POA members and live within the budget. I do a lot of this from 800 miles away, this becomes difficult at times, but when I find out after the fact that an insurance renewal was done without prior notice or a chance to get comparisons, - and believe FRPM did not get comparisons- this is a problem. In the past, the renewal was presented for approval, then paid, when did this change -the same for the pool and fence and advertising additions, etc.?

Lastly, the information from SC office is becoming less and less, the daily log is not very helpful anymore, then add in the attitude. The week Tara was sick brought out some short comings at the SC office. The use of the cell phone for personal use for over 6 months is unacceptable, - Tara stated you knew and approved this. Also, we traveled 1600 miles(800 each way) to correct the CO monitoring procedure that was being done incorrectly. Over the previous 6 months, how many water heater changes and unnecessary expense to owners was caused by water heaters being changed due to inaccurate readings, - will we ever know? Now there is a question about who pays for cut AC lines – you have all the information I have on that. The false accusation of not responding to issues or emails from SC, made by Tara at a meeting, is unacceptable. The attitude and communication being sent from SC office is bordering on unacceptable. There needs to be guidance and supervision at SC office, they cannot be left alone, just as you or I cannot. Communications are central to any relationship.

We all have others to answer to and when I get calls from owners who are upset or I find out after the fact an operation or procedure is being done differently than agreed upon, this becomes an issue. Information has to be verified and corrected if needed before it becomes a problem

We all need to work together as a team to accomplish the best value for the members of the POA, the board has been elected to do so, please involve them and give them the necessary information to act appropriately.

Look forward to your responses to the attached issues.

--

Virgina and Jon

9



Commerce Centre <ccbusinesspark@gmail.com>

Fw: Carbon Monoxide/ Testing procedures

14 messages

VJK <aire1@pacbell.net>

Wed, Mar 21, 2012 at 5:23 PM

To: Jay Arla <jay.arla@gmail.com>, Chris Schwab <cmschwab@aol.com>, David Meisner <dbmeisner@gmail.com>

Cc: Commerce Centre <ccbusinesspark@gmail.com>

Update on Water Heater issues and CO testing. As you have been aware, there have been issues with readings of CO levels inside units and flues. This has, in the past, resulted in the gas company shutting of the gas until the issue can be resolved. Currently, all units are in compliance, subject to change due to many variables. On going testing and procedures are being modified to make sure tenants and owners are protected, we are being proactive.

Attached are documents supporting the attached procedures below. These procedures are being implemented to prevent serious health conditions and hopefully find issues well in advance of a serious health hazard arising. These procedures were worked out with the on-site managers, the maintenance supervisor, and Virginia and I.

Please review and direct any questions to us. We are thinking these procedures need to be sent to owners to bring them up to date and aware of how Water Heaters are being handled, in addition, what is expected of owners. Should the gas company be called, the unit will have no gas service which will most likely result in the loss of a tenant.

Thank you for reviewing, let us know if we can proceed with presenting the email information below. The documentation is for the board, let me know if it should be included.

Virginia and Jon

— On Wed, 3/21/12, Sheila <sheila@frpmrentals.com> wrote:

From: Sheila <sheila@frpmrentals.com>
Subject: Carbon Monoxide/ Testing procedures
To: "sagecrest" <sagecrest@frpmrentals.com>, aire1@pacbell.net
Cc: "Lizz" <Lizz@frpmrentals.com>, "Tony Drost" <tony@frpmrentals.com>
Date: Wednesday, March 21, 2012, 1:04 PM

Attached is the paperwork Jon brought in regarding carbon monoxide. Below is what I have for the procedures:

Air filters are being changed monthly 10-12 buildings at a time starting next month. This will prevent overtime and spread the 3-4 day process out throughout the months.

During the filter changes the carbon monoxide detector is to be turned on and set somewhere in the room so the air can be tested while the filter is changed.

If the reading is 30 or above in the room a proper test must be done in the flue of the water heater. Be sure to turn on all hot water in the apartment so water heater can kick on and run for 5 minutes prior to testing the air in the flue.

If the air in the flue tests 100+ call the owner to discuss replacement. Follow up with an email for documentation. Install a carbon monoxide/fire detector combo if one isn't already present. If water heater isn't replaced conduct proper test in the flue in 30 days. Continue to do so every 30 days until water heater is replaced. Educate tenants.

If air in the flue tests 300+ contact owner and inform immediate water heater replacement is required. If owner refuses contact Intermountain Gas to come test and shut the water heater down if needed. If you are not able to get a hold of the owner and haven't received a response via phone or email within 24 hours contact Intermountain Gas to test and shut down. Follow up with email to the owner. Educate tenants.

Carbon monoxide/fire detector combos are to eventually be installed in every unit to replace the smoke detector in the hallway. This is to be done on turnovers, during preventative maintenance, lease renewals, or if smoke detector is faulty in a unit until each one has one.

Thanks,
Sheila Thomason
Maintenance Supervisor
First Rate Property Management

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Standard Operating Procedure

5.5.2 FIRST RESPONDER

- (A) Occupancy of the structure or incident investigation shall not occur until the structure has been ventilated and CO levels are under 200 ppm CO.
 - (1) **0-10 ppm** in ambient air above outside reading – and gas appliances have been eliminated as a source of CO – reads will be considered normal.
 - (2) **11-69 ppm:** The employee shall evaluate the situation and take appropriate action to ventilate the building and, if necessary, evacuate the premise. Check all gas appliances for proper operation.
 - (3) **70-199 ppm:** The employee shall shut off all gas appliances, ventilate the building, and if conditions warrant, evacuate the premises. The employee shall limit their exposure to no more than 15 continuous minutes within the building. Contact your supervisor for assistance.
 - (4) **200 ppm and greater:** Evacuate the building and call for assistance. If possible, shut off gas supply at the meter. No reentry is allowed until safe levels are obtained.
 - (5) Record all readings obtained and instrument(s) used.
- (B) Before entering the structure, the First Responder will zero the CO meter in ambient air.
- (C) If customer is not at home, the First Responder will tag the door, turn off the gas meter, notify the manager, and request additional instructions.
- (D) If the alarm has sounded and instrumentation cannot verify the presence of CO, check the manufacturer's date on the alarm. On any alarm not designed to 1998 UL 2034 Standards; the customer needs to be advised to replace the alarm.
- (E) Advise the customer to call every time the alarm is activated.
- (F) The First Responder will check the entire atmosphere of the structure with a CO meter.
 - (1) The entire atmosphere of the structure should be checked at all levels possible. CO has a specific gravity of .97 which makes it very similar to air and may pocket in a room rather than rise or fill the room.
 - (2) Any detectable amount of CO shall be traced to its source.
 - (3) If a vented gas appliance is emitting detectable amounts of CO, and repair or adjustments cannot be made, the appliance shall be red tagged and turned off.
 - (4) Unvented gas appliances shall not emit over 10 ppm CO detectable in the atmosphere of a structure.
 - (5) Verification reads shall be taken and documented on the customer service order after CO sources have been eliminated.
 - (6) The First Responder shall immediately notify the manager or supervisor if the following occurred:
 - (a) Concentrations of CO are over 30 ppm.
 - (b) Medical treatment by a physician is required.
 - (c) Hospitalization.
 - (d) Death.
 - (e) Upon notification from a First Responder of any CO incident where hospitalization, death or media coverage has occurred, the Supervisor On-Call will notify:
 - (i) The General Office immediately and forward all information related to the incident.
 - (ii) The Vice President of Marketing and External Affairs.

Standard Operating Procedure

Percent C.O. in Atmosphere	Parts per Million	Response (for a Work Related Environment)
.0030%	30	This is the company's established reaction threshold. Any concentration of CO above this limit requires action to resolve.
.0050%	50	OSHA standard is 50 ppm CO as the threshold limit value based on a time-weighted average concentration for a normal working day (8 Hours).
.007%	70	A heavily exercising individual exposed for three hours at this level will have approximately ten (10) % carboxyhemoglobin (COHb) in the bloodstream. This is the second benchmark at which CO alarms must sound.
.02%	200	Should not be exposed above this level for any period of time. Possible mild frontal headache and nausea after one to two hours.
.08%	800	Headache, dizziness, and nausea in 45 minutes, collapse, unconsciousness, possible death in two hours.
.15%	1,500	Immediately dangerous to life and health. Headache, dizziness, nausea. In minutes collapse and unconsciousness.
.32%	3,200	Headache and dizziness in five to ten minutes. Unconsciousness and possible death in 10 - 15 minutes.
.64%	6,400	Headache and dizziness in one to two minutes. Unconsciousness and possible death in 10 - 15 minutes.
1.28%	12,800	Immediate effect, unconsciousness and danger of death in one to three minutes.

5.5.3 CANNOT GET ACCESS (CO INVESTIGATION)

If the First Responder cannot gain access to a building that was reported as having a CO leak:

- (A) Evaluate if anyone may be inside that is exposed to hazard, and notify emergency response personnel for access.
- (B) The meter will be shut off and tagged. Leave a notification for the building occupants of the reason for shut off.
- (C) Notify supervisor.

5.6 OUTSIDE ODOR INVESTIGATION

- (A) For gas odors reported outside, the First Responder will investigate the source of the leak with an approved and calibrated combustible gas indicator (CGI) to confirm that all possible leak sources are checked:
 - (1) At the meter riser.
 - (2) At ten feet along the building foundation on both sides of the meter set.
 - (3) Along the service line from the meter to the main tie-in point.
 - (4) Along the main, if the odor was reportedly emanating from the area of the main or street substructures, like sewer grates. Check edges of pavement, cracks, boxes, etc.
- (B) If source cannot be located, perform a Six Point Check and secure all leaks detected.
 - (1) Begin at the reported location and work outward checking for signs of odor and leaks on above ground equipment.
 - (2) Check for gas inside buildings adjacent to the reported location and when leaks are found on that equipment. If access cannot be provided, then probe the foundation for gas.

CARBON MONOXIDE PROCEDURES

Revised Date: March 20, 2012

→ Throughout this process, continued diligence is necessary to protect tenants safety and complex from possible hazardous conditions. Our goal is to have a safe and comfortable environment.

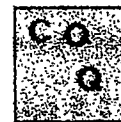
These procedures shall be followed for detecting CO (carbon monoxide) levels in units:

- A. Air filters shall be changed monthly; by 10-12 buildings at a time, starting April 2012
- B. During filter changes; the carbon monoxide detector testing unit shall be turned on prior to entering each unit, warmed up, and set to zero. Once in the unit, the tester shall be set on the kitchen counter sampling the air in the hall and living room.
- C. During the time of testing, the filter shall be changed, the area around the water heater inspected and cleaned-if necessary.
- D. Once the filter and water heater areas are completed, the tester shall be read. If the reading is below 30ppm, no further action is required.

Action required if:

- E. If the tester reading is 30ppm or above in the room- a proper test shall be conducted in the flue of the water heater. Be sure to turn on all hot water in the apartment so water heater can turn on and reach operating temperature, reset the tester to zero and make sure the water heater runs approximately 5 minutes prior to testing the air in the flue.
- F. If the air in the flue tests results in a reading between 100 and 300ppm, a note to call the owner shall be made to discuss replacement of the water heater. At the time of calling the owner, a follow up email for documentation shall be sent to the owner. At this time, a UL approved carbon monoxide/smoke detector combo shall be installed in the area of the hallway; unless one is already present. Should the owner elect not to change the water heater at this time, a second test shall be conducted on the water heater flue at operating temperature in 25 to 30 calendar days. Continue to do so every 25 to 30 calendar days until a safe condition exists-below 100ppm in the flue. Educate tenants. Should the water heater proper flue testing result in a higher reading than 300ppm at any time during this period, proceed to next step, G.
- G. If air in the flue tests 300ppm or above, note the reading, then, contact owner and inform immediate water heater replacement is required, followed up with an email for documentation. If owner refuses water heater replacement, advise owner Intermountain Gas is to be contacted so they can conduct a test of the unit. Should the results from this test be out of limits according to Intermountain Gas, a mandatory shutdown of the water heater will be done by the gas company. Should the owner not respond by phone or email within 24 hours of email notification, then, contact Intermountain Gas to conduct further testing. Educate tenants. At this point, a CO monitor shall be in place and operational, if one is not in place, install a CO/smoke monitor combo-UL approved in the hallway area.

→ Carbon monoxide/smoke detector combos are to eventually be installed in every unit by replacing the existing smoke detector currently in the hallway area. CO monitors shall be changed out or replace existing smoke detectors in the hallway area during -- turnovers, preventative maintenance, lease renewals, or faulty smoke detector - until complete. (Should a smoke detector fail in a bedroom, the existing unit in hallway area shall be moved to the bedroom, if operational, and a new carbon monoxide/smoke detector shall be installed in hallway area.)



Carbon Monoxide -

CO EXPOSURES AND SCALE OF EFFECTS FROM ZERO TO ONE MILLION PARTS PER MILLION (ppm)

(Modified from Donnay, 2001)

<<<1 ppm (20-30 nanomoles/L tissue water; 0.56 ul/L) - Naturally/normally found in human tissues; a concentration 3-4 orders of magnitude smaller than would be possible based on its solubility in water (at body temp. & 760 mmHg max. solubility = 18.3 ml/L.). CO appears to play a physiological role in vasomotion, etc.

<1 ppm - Amount of CO in clean air.

0.4 - 1.6 ppm - Range of average ambient outdoor CO exposure over which asthma prevalence among middle schoolers was linearly correlated, and more significantly than with any other pollutant studied (NO_x, SO_x, Ozone, or particulates of any size) (Hajat et al., Thorax, 1999; Norris et al., Environ. Health Perspectives, 1999).

1 ppm = 0.0001% - Increase in average ambient outdoor CO was associated with a 30% increase in the odds of unmedicated asthmatic children reporting symptoms the next day - stronger association than with any other pollutant studied: (Environ. Health Perspectives, Dec., 2000).

See the page on relationship between ppm and % of CO

0 - 2 ppm - Range of CO found in end-tidal breath (ETCO_b) of healthy non-smokers due to systemic but variable endogenous CO production.

2 ppm (+/-2.5) - Level of CO found in U.S. homes.

3 - 4 ppm - Borderline range for ETCOb in non-smokers.

5 ppm - Lowest level of CO displayed by first-AIM low-level CO monitors (not approved by UL or CPSC).

3 - 7 ppm - A 6% increase in the rate of admission of non-elderly for

asthma was associated with a change in CO in Seattle, Washington (Sheppard et al., Epidemiology, 1999).

>5.5 ppm (3-month average) - CO level above this value during the last trimester of pregnancy was associated with a significantly increased risk for low birth weight in Los Angeles study of 125,573 pregnancies (Ritz & Yu, Environ. Health Perspectives, 1999).

5 - 10 ppm - Range of increase in average outdoor CO found associated with a significant increase in heart disease deaths and hospital admissions for congestive heart failure.

5 - 25 ppm - Normal range of ETCOb in smokers who have not recently smoked.

9 ppm - US EPA's national ambient air quality standard 8-hour average (TWA) limit for CO exposure outdoors (rarely ever exceeded now in U.S. cities).

- **WHO 8-hour average (TWA) limit for CO exposure outdoors.**
- **ASHRAE recommended indoor CO limit.**
- **"Action" level with regard to CO for many public safety organizations.**
- **Level above which many public safety organizations (fire departments, etc.) red-tag and prevent further use of combustion devices.**
- **Lowest CO level producing significant effects on cardiac function (ST-segment changes, angina) during exercise in subjects with coronary artery disease. (Allred et al., Environ. Health Persp., 1991, and others).**

10 ppm = 0.001%

11 ppm - Health Canada's 8-hour average legal limit for any CO exposure.

15 - 35 ppm - Range of ETCOb found in non-smokers recently and chronically exposed to high levels of CO indoors from inadequately vented combustion appliances in their homes.

20 ppm - US OSHA heat exposure standard: maximum allowable ETCOb post shift in non-smokers.

25 ppm - WHO 8-hour average limit for any CO exposure.

25 ppm - 150 ppm - ETCOb of smokers immediately after smoking.

30 ppm - Lowest CO level that US CPSC and UL/CSA allow home CO alarms to display (based on UL standard #2034, 3rd revision, OCT., 1998). The health reasons for this are obscure.

35 ppm - US EPA's national ambient air quality standard 1-hour average limit for CO exposure.

- **US NIOSH recommended 8-hour average limit for occupational CO exposure**

- **Level above which Baltimore City fire fighters use self-contained breathing apparatus.**

50 ppm = 0.005% CO - US OSHA 8-hour average legal limit for occupational CO exposure (the highest occupational CO limit in the world)

70 ppm - Lowest CO level at which US CPSC and UL/CSA allow home CO alarms to alarm, but only after 1 - 4 hours of exposure. The health reasons for this are also obscure.

100 ppm = 0.01% CO - Level at which Baltimore City F.D. orders evacuation of any building (12-14% COHb at equilibrium). many safety agencies will often do so at far lower CO concentrations.

100 - 1,000 ppm = 0.01%-0.1% CO - Range of CO found in exhaust of gasoline-powered motor vehicles with hot (working) catalytic converters.

200 ppm - Level at which US NIOSH recommends immediate evacuations of any building - level above which US CPSC and UL approved home CO alarms must sound after 30-60 min. - Level of CO (air-free) allowed inside water heater flues by an American gas association (now ANSI) standard.

200 - 300 ppm - Range of CO in exhaled (diluted) cigarette smoke (exceeds water heater limit!).

400 ppm - Level above which CPSC and UL approved home CO alarms must sound after 5-15 min.

- **Level of CO (air-free) allowed inside furnace flues by an American gas association (now ANSI) standard.**

500 ppm = 0.05% CO - Roughly the level of CO thought to be lethal in humans exposed over a period of many hours (42-45% COHb at equilibration).

800 ppm - (air-free) Level of CO allowed inside oven flues by an American gas association (now ANSI) standard, # Z21.1. [this level is unchanged since 1921 when oven flues were still vented outdoors like woodstoves, instead of directly into the kitchen as they have since 1950s]

1,000 ppm = 0.1% CO - Level of CO commonly considered rapidly lethal in humans (approx. 62% COHb at equilibration).

1,000 - 5,000 ppm - Level of CO in exhaust gases from "well-tuned" diesel engines.

1,200 ppm = 0.12% CO - Level of CO declared by US NIOSH to be immediately dangerous to life and health (potentially lethal within minutes, certainly within a few hours).

3,000 - 10,000 ppm - Level of CO in exhaust gases from "well-tuned" propane-powered forklift trucks (ie. lifts) without functioning catalytic converters. Dangerous!

5,000 ppm = 0.5% CO - CO level in coal gas used almost exclusively for gas lighting in the USA from 1819-1865 (thereafter until widespread introduction of natural gas in the 1950's, coal gas was usually mixed with other gases containing even higher concentrations of CO).

10,000 - 100,000 ppm = 1% - 10% CO - Range of CO found in exhaust of gasoline-powered vehicles without catalytic converters or with converters that are cold or otherwise not working. Dangerous!

220,000 - 300,000 ppm - CO concentration undiluted blast furnace (steel-making) gases.

250,000 - 350,000 ppm = 25% - 35% CO - Range of CO in mixed or utility gas made from 1870s until 1940s by mixing coal gas (5% CO) and water gas (50% CO).

500,000 ppm = 50% CO - Water gas (made by spraying water onto hot coals, $C + H_2O = H_2 + CO$). Invented in Paris, but banned there in 1854 as too deadly. Introduced in the USA in 1858 and widely used in mixtures with coal and/or other gases until 1940s for lighting, heating, cooking and in industry. Banned only in Massachusetts from 1880 - 1890.

Thimbles are used to maintain required clearances and seal unwanted air leaks where vents run through ceilings or sidewalls. Roof jacks are used where vents penetrate the roof and contain a flue gas passageway, an insulating means, flashing, and a cap. Where the vent for a gas appliance is located in or passes through an attic, crawlspace, or other cold area, the vent shall be Type B or Type L and installed with no less than the listed clearance to combustible material.

Combustion Air

Air is needed to burn any fuel, including natural gas and propane. Sealed combustion appliances draw combustion air from outside, but atmospheric units draw combustion air from the CAZ. When there is insufficient air, combustion is inefficient and dangerous. To supply sufficient combustion air for atmospheric units, the volume of space in which the combustion equipment is located must be 50 ft³ per 1000 Btu/h of combined input for all combustion appliances in the space. In confined spaces where there is insufficient combustion air, the combustion appliance zone must be vented to outdoors or opened to a larger interior space. Such vents or grilles should have a minimum free area of 2 in² per 1000 Btu/h for all combustion equipment in the confined space. When opening the combustion appliance zone to a larger interior space, half of the grille area should be located within a foot of the top of the door or wall and the other half of the grille area should be within a foot of the floor. The minimum net free area of each vent or grille should be no less than 100 in².

Install a CO Monitor When a Combustion Appliance is Present. CO monitor should be installed when combustion appliances are present. Inspect heating, water heating, and cooking equipment to find if hazardous conditions exist. The CO monitor should be installed in the hallway near every separate sleeping area. Make sure the monitor is installed per manufacturer's instructions.

CO monitor should meet the requirements of UL-2034 or IAS 6-96. Exposure to a low concentration over several hours can be as dangerous as exposure to high carbon monoxide levels for a few minutes. It is recommended that both low-level and high-level CO monitors be installed.

When assessing a home, keep in mind the symptoms of CO poisoning. Many people with CO poisoning mistake their symptoms for the flu or are misdiagnosed by physician. Initial symptoms include headache, fatigue, shortness of breath, nausea, and dizziness.

9 ppm is the maximum allowable concentration in a Living Area.

The Hot Climate Initiative is a partnership between DOE and hot climate states to reduce energy costs for low-income persons by improving the energy efficiency of their homes while ensuring their health and safety. Domestic funding cuts in 1995 left hot climate states hard-pressed to fund weatherization staff and services. Recent funding increases have allowed DOE to reinvigorate the Hot Climate Initiative to help states adopt new weatherization practices.

Weatherization Technical Program Standards

- Anthony Cox, New River Center for Energy Research and Training, (480) 361-9446 x303
- John Langford, J&J Weatherization, (434) 847-5487
- Alex Moore, SMS Results, (703) 938-0021
- R.W. Davis (technical reviewer), Energy Conservation Services Group, (740) 664-5108



Figure 1: A close-up view of a vent pipe or chimney structure, showing the connection to the appliance and the surrounding structure.

Tools & Equipment

- ☐ combustion analyzer
- ☐ gas leak detector
- ☐ digital manometer
- ☐ blower door
- ☐ lighter (w/ long handle)
- ☐ smoke bottle
- ☐ mirrors
- ☐ soap bubbles
- ☐ jumper wires
- ☐ high-temperature silicone
- ☐ ladder
- ☐ tape measure
- ☐ flashlight and straps
- ☐ screwdriver
- ☐ nut drivers
- ☐ self-tapping screws
- ☐ lag bolts or plugs
- ☐ tin snips
- ☐ compact snips
- ☐ 3/16" drill and 1/16" drill bit
- ☐ cleaning equipment
- ☐ non-contact voltage detector
- ☐ chimney liner
- ☐ NFPA 54
- ☐ NFPA 31
- ☐ NFPA 211
- ☐ Weatherization Technical Program standards
- ☐ Weatherization field guide

COMBUSTION APPLIANCE SAFETY & EFFICIENCY TESTING

This technical brief summarizes the inspection and testing of combustion appliances taught during the 2006 Florida whole-house weatherization training as part of the U.S. Department of Energy's Hot Climate Initiative. The materials provided during training contain more detailed information.

Combustion appliances such as furnaces, space heaters, and water heaters present potential health and safety hazards and should be inspected to ensure safe operation. The following inspection and test procedures will identify dangerous fuel leaks, the potential for carbon monoxide (CO) poisoning, and fire hazards.

What to Look for During Safety & Efficiency Inspections

Safe operation of combustion appliances requires a controlled fuel supply, sufficient combustion air, drafting of exhaust gases, and a properly configured vent and chimney system.

Check for Fuel Leaks

Use a calibrated gas leak detector at joints, fittings, and along pipes to determine if fuel is leaking. Natural gas is lighter than air so test above joints, fittings, and pipes. Propane or LPG is heavier than air so test below the connections. Use soap bubbles to confirm a leak since some types of pipe dope (joint sealant) may set off the detector.



Measure Ambient Carbon Monoxide (CO)

Ambient CO levels should be monitored in the living space and the combustion appliance zone to ensure the safety of agency staff and weatherization contractors as well as occupants. Remember to calibrate the combustion analyzer outside and measure outdoor baseline CO levels before the test to ensure the accuracy of CO readings. If ambient CO levels exceed 9 parts per million (ppm), the house and combustion appliance zone should be ventilated before further testing and repair of the CO problem.

Unvented Space Heaters

Every weathered house must have a vented heating system as the primary source of heat. Unvented space heaters shall be removed from the dwelling. In areas with frequent electrical power outages, it may be advisable to install vented space heaters capable of operating without electricity. If the customer refuses to give up the unvented space heater(s) and refuses the installation of a vented heated system, the house shall not be weatherized.

Unvented space heaters are not allowed in mobile homes. Unvented space heaters found in mobile homes shall be replaced with direct vent models. Pollutants and moisture in exhaust combustion gases are released by unvented space heaters into conditioned space. Moisture in the combustion gases condenses on cold surfaces, sacrificing the mobile home's durability.



Figure 2: A close-up view of a vent pipe or chimney structure, showing the connection to the appliance and the surrounding structure.

Support the Vent and Chimney

The National Fire Protection Association's *National Fuel Gas Code (NFPA 54)*, *Standard for the Implementation of Oil-Burning Equipment (NFPA 31)*, and *Standard for Chimneys, Fireplaces, Vents, and Solid-Fuel-Burning Appliances (NFPA 211)* should be reviewed to ensure that the vent and chimney are properly installed. NFPA 54 includes installation procedures for natural gas- and propane-fired appliances. NFPA 31 includes installation procedures for oil-fired appliances. NFPA 211 includes installation procedures for venting, chimneys, wood-burning stoves, and fireplaces. Check for proper vent type, size, and clearance. Look for sound condition and code-compliant installation.

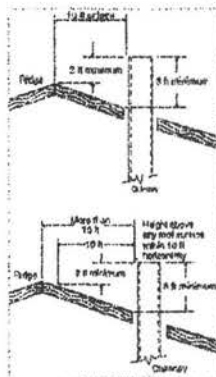
- Chimneys and vents should be connected and unblocked.
- Plug any unused holes in the chimney or vent.
- Chimneys should have a sound liner or a new liner must be installed.
- Determine the cause of any corrosion in the vent system. Corrosion can be caused by condensing flue gases or by exterior water leaks. Inadequate or missing chimney flashing may mark signs of acidic condensation within an improperly designed or insulated vent system.
- Horizontal runs of vent pipe must rise $\frac{1}{4}$ " per linear foot in the direction of the outlet so that any condensate can run back to the combustion appliance.
- Masonry and metal chimneys should extend at least 3' above the highest point at which they pass through the roof of a building and at least 2' higher than any portion of the building within 10' (B vent height may be less per NFPA with a listed wind-rated cap).
- Make sure the vent has an appropriate vent cap.

Vents must be the appropriate type and size for the combustion appliances they serve. Site-specific circumstances will determine which vent type is appropriate (see table on inside of last page).

- Type B vent is double-wall pipe for gas- or propane-fired combustion appliances. An air gap between the pipes acts as an insulator. The inner vent pipe is aluminum and the outer is galvanized steel.
- Type BW vent is an oval B vent designed for wall furnaces.
- Type L vent is double-wall pipe for gas, propane, and oil-fired combustion appliances. This is much like Type B vent except the inner pipe is stainless steel. L vent is always used with oil-fire equipment while manufacturers may specify L vent for some gas- or propane-fired appliances.
- Due to their high temperatures, woodstoves require hardier vent systems (see table on inside of last page).
- Type PVC Schedule 40 pipe is used for 90+ condensing units.
- Mobile home furnaces and direct-vent space heaters are sealed combustion appliances that exhaust combustion gases and draw combustion air through the same double-wall vent system. Remember that mobile home furnaces must be specifically labeled for use in mobile homes.

Vents and vent connectors should be at least the same diameter as the exhaust port of the combustion appliance. Size the vent and vent connector using NFPA 54 or NFPA 31 based on the number and type of appliances, vent type, vent height, connector size or lateral run, and the type of chimney.

Continued on inside of last page.



The horizontal run cannot be more than 75% of the chimney height. If the horizontal run is more than 10', the diameter must be increased by one size (e.g. 3" to 4"). Because of their restriction to draft, 90° elbows are equivalent to 10' of horizontal run.

COMBUSTION APPLIANCE	MINIMUM ALLOWABLE VENT TYPE	
	Conditioned Space	Unconditioned Space
Gas-Fired Forced-Air Furnace (natural gas or propane)	Single-Wall Galvanized or B Vent	B Vent
Gas-Fired Warm Space Heater (natural gas or propane)	Single-Wall Galvanized or B Vent	B Vent
Gas-Fired Water Heater (natural gas or propane)	Single-Wall Galvanized or B Vent	B Vent
Oil-Fired Furnace, Boiler, or Water Heater	Single-Wall 24- or 26-gauge Steel, or L Vent	L Vent
Mobile Home Furnace	Single-Wall Galvanized or B Vent	B Vent
Direct-Vent Space Heater	Special	Special
Condensing Forced-Air Furnace (90+ AFUE)	Single-Wall Galvanized (through clearance usually 6 inches BW Vent)	BW Vent
Flue Furnace	N/A (exhaust vent system usually in unconditioned space)	Gas B Vent Oil L Vent
Gas-Fired Wall Furnace	Single-Wall Galvanized (through clearance usually 6 inches BW Vent)	BW Vent
Woodstove	Single-Wall 24-Gauge Black Steel, or Shielded Single-Wall (e.g. Super Six or Duromax)	Double-Wall Stainless with Insulation Between Walls (e.g. 35W or All-Pipe), Triple Wall

Clearances are allowable distances between heat-producing appliances, chimneys, or vent systems and combustible surfaces. These vary for different combustion appliances and venting systems, and are listed in the tables below.

VENT CONNECTOR TYPE	CLEARANCES		
	Combustion Appliance Type	Without Protection	With Heat Shield
Single-Wall Galvanized	Vented gas space heaters	0"	2"
	Atmospheric gas furnaces and water heaters	0"	2"
24 Gauge Steel (Black or Stainless)	Pen-extended draft gas furnace (90+ AFUE)	16"	6"
	Oil furnace, vented space heaters, boilers, and water heaters	18"	6"
B Vent (including BW)	Atmospheric gas furnace and water heaters, Pen-extended draft gas furnace (90+ AFUE)	Install per manufacturer's instructions (usually 3")	Install per manufacturer's instructions (usually 3")
L Vent	Oil furnace, boilers, or water heaters	Install per manufacturer's instructions (usually 3")	Install per manufacturer's instructions (usually 3")

For atmospheric chimneys, combustion gases draft because they are more buoyant than air. The strength of the draft is affected by the chimney height, cross-sectional area of the chimney, temperature difference between ambient air and combustion products, and wind. See *Test Worst-Case Draft*.

CHIMNEY TYPE	Minimum Clearance from Combustible Surfaces
Interior chimney masonry with fireclay liner	2"
Exterior masonry chimney with fireclay liner	2"
All-fuel metal vent, horizontal double-wall or triple-wall pipe	Install per manufacturer's instructions (usually 2" or less)

Test Cook Stove for CO:

- Range Top Burners: Hold probe of combustion analyzer 6" to 12" above each burner. The reading should decrease and then stabilize after about 30 seconds. Read before about 10 seconds then 25 ppm as measured.
- Oven:
 - Remove pots and pans.
 - Check for aluminum foil or oven blocking combustion air holes. If found, remove before testing.
 - Place probe from testing device well into exhaust vent of oven. This is usually a 1 x 5 inch hole near the back of the range top. This will give an undisturbed sample of combustion gases.
 - Set oven to bake at 500°F.
 - Measure for a minimum of 10 minutes and record CO level.
 - While the ANSI standard for cook stove CO is 800 ppm air free, a more appropriate action level for residential is 100 ppm as measured. The test ppm air free is an unadjusted 100 standard.

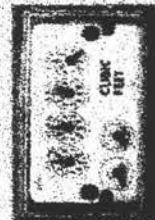
Water Heaters:

- Inspect the vent system for correct size, materials, and installation as described above.
- If applicable, inspect the chimney into which the vent system is connected as described above.
- Check CO levels as described in *Measure the Gas for CO and Efficiency*.

If the vent heater is located in a different area than the heating system, perform a worst-case draft test of the additional CAZ as described above.

Check the Gas Meter

Check the gas meter using the "Café Calibration" card provided during training to detect under firing or over-firing. Check only one appliance at a time. If the actual fuel input varies from the rated input on the furnace nameplate by more than 10% (± 5% for 90+ condensing units), refer the unit to a HVAC technician for inspection and report to adjust gas pressure to acceptable levels (3.5 inches of water column for natural gas and 13 inches of water column for propane).



CAZ's Calibration

SIZE OF THE METER DIAL

Seconds for one revolution of the dial	1/2" Dia. (1/2" Dia.)	1" Dia. (1" Dia.)	1 1/2" Dia. (1 1/2" Dia.)	2" Dia. (2" Dia.)
15	120	240	480	480
20	90	180	360	360
25	72	144	288	288
30	60	120	240	240
35	51	103	206	206
40	45	90	180	180
45	40	80	160	160
50	36	72	144	144
55	33	65	131	131
60	30	60	120	120
70	26	51	103	103
80	22	45	90	90
90	20	40	80	80
120	15	36	60	60
150	12	28	48	48
180	10	20	40	40

HOW TO COMPLETE SAFETY & EFFICIENCY INSPECTIONS

Inspect and Clean the Heat Exchanger:

- Check the heat exchanger with a brush and vacuum cleaner remove soot and debris.
- Inspect the heat exchanger using a flashlight and a mirror to determine whether cracks or holes are present.
- If cracks or holes are found, replace the heat exchanger if a new one can be found, or select the unit for replacement. If the unit is more than 10 years old, replace the entire unit instead of just the cracked heat exchanger.

Measure Flow Gases for CO and Efficiency:

- Start the heating unit. Allow it to reach "steady state," a condition that exists when the stack temperature stops rising more than 2 in 30 seconds.
- Insert the probe into the heat exchanger ports (see figures on next page) of the furnace, taking a complete set of readings in each port. For a water heater, insert the combustion analyzer probe down into the water heater before the draft diverter and take readings on both sides of the baffles.
- Check the table below to determine if the heating unit is within acceptable ranges.
- If CO exceeds acceptable levels:
 - Verify that the vent system is allowing sufficient draft as described in *The Vent-Cap Draft*.
 - Verify that the gas pressure is within an acceptable range by consulting the gas pressure or checking the gas meter (natural gas only, see *Check the Gas Meter*).
 - Adjust the primary and/or secondary air on the gas burner as described below to reduce CO to acceptable levels.
 - If step 4 does not reduce CO to acceptable levels, enter the heating system for replacement as a health and safety hazard.
- Measure the efficiency in each combustion port.

APPLIANCE	CO (ppm, as measured)	CO (ppm, air-free)
Gas furnace, boiler, or water heater	100 ppm, as measured (300 ppm, air-free)	400 ppm, air-free
Unvented gas space heater	200 ppm, air-free	200 ppm, air-free
Oil-fired furnace, boiler, or water heater	100 ppm, as measured	200 ppm, as measured
Gas cook stoves	25 ppm, as measured	800 ppm, air-free (1929 standard)
Gas cook stoves: Ovens	100 ppm, as measured	800 ppm, air-free (1929 standard)

Check Gas Burners:

- Check gas burners of fan and fire. Adjust primary and/or secondary air and the gas pressure so that the unit is within the acceptable CO and efficiency levels.
- Outline make-up and repair items, such as fuel pressure (see *Check the Gas Meter*) and draft adjustments may have to be performed prior to completing air adjustments.



Figure 1: Combustion analyzer probe inserted into furnace heat exchanger port.

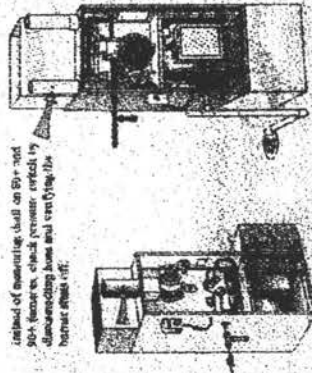
Figure 2: Combustion analyzer probe inserted into water heater vent pipe.

Test the Gas Valves (if the unit has a standing pilot):
 1. Turn on the pilot light. Turn on a click to indicate that the gas valve solenoid has acted. It should close within two and a half minutes. Verify this with a combustible gas leak detector. If it does not, the gas valve is faulty and should be replaced.

- Test the High-Limit Switch:
 - a. Turn the power on. Remove the blower belt or disconnect one of the electrical leads to the blower motor. Tape lead to prevent short or short circuit.
 - b. Insert a thermometer immediately above the first changeover on the distribution side.
 - c. Turn power on.
 - d. Give a call for heat by turning on the thermostat (or by disconnecting one leg of the thermostat and placing a jumper wire from T1 to T2 at the gas valve if it is a very hot day if the thermostat is broken). Make sure the high-limit wiring on the limit control is set to a maximum of 200°F.
 - e. Listen for the combustion being shut down as the heat exchanger air heats up beyond the limit control setting, signaling the limit control to close the gas valve.
 - f. If this does not occur at the temperature setting, the limit control is faulty and must be replaced.
- Test power off.
 - a. Disconnect the thermostat and/or blower motor. Turn the power on.
 - b. Cycle the unit to ensure proper operation of the furnace.

A worst-case draft test should be performed before and after weatherstripping to ensure that combustion products are exhausted from the living space. If weatherstripping takes more than one day, a worst-case draft test should be performed at the end of each workday to ensure the house is left in a safe condition. During the test, the combustion appliance zone is depressurized (usually by turning the appliance off), and the blower door is "blown" (not with a blower, but to determine if the chimney "leak" can exhaust combustion products in conditions that worst-case draft).

- Measure and record the outdoor temperature. Deactivate combustion appliances and exhaust fans. Check and clean the dryer fan filter and vent. Replace or clean furnace filter if needed.
- Close all windows and retract doors. Open all windows down. Measure the pressure difference of the combustion appliance zone (CAZ) with respect to the combustion appliance zone. This is the baseline pressure that should be subtracted from all other CAZ readings.
- Turn on all exhaust fans such as bathroom or kitchen fans and the clothes dryer. Do NOT turn on the whole-house fan. Measure the pressure difference of the CAZ with respect to outdoors.
- Close all attic doors except those to rooms with exhaust fans and again measure the pressure difference of the CAZ with respect to outdoors.



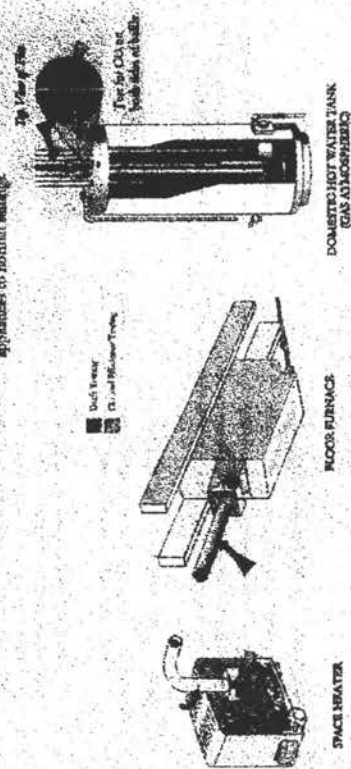
Acceptable Draft Reading for Worst Case Draft Test at Listed Outdoor Temperatures (°F)		
520	21.48	41.69
-8 Pa	-3 Pa	-2 Pa
0.0207" wc	-0.0167" wc	-0.0087" wc
-15 Pa	-13 Pa	-9 Pa
0.0425" wc	-0.0325" wc	-0.0195" wc
0.0625" wc	-0.0425" wc	-0.0295" wc

- [illegible]

Close the door to the furnace room. Measure the pressure difference of the CAZ with respect to outdoors.

- a. Repair chimney obstructions, discontinuities or leaks.
 - b. Properly size vent, connectors, and liners.
 - c. Install a metal chimney liner and/or a vent stand chimney cap.
 - d. Seal leaks at the return ducts in the CAZ.
 - e. Balance supply and return air by adding new returns or by adding pressure returns (or openings to the main body of the house).
 - f. Reduce capacity of large exhaust fans.
 - g. Provide make-up air for dryer and exhaust fan, and/or
 - h. Provide combustion-air inlet to CAZ.
11. Ensure that repairs allow adequate draft by increasing return-vent CAZ conditions and ventilation.

Return dwelling exhaust fans, and combustion appliances to normal settings.



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Unauthorized reproduction of any symbols or other forms is against the law.

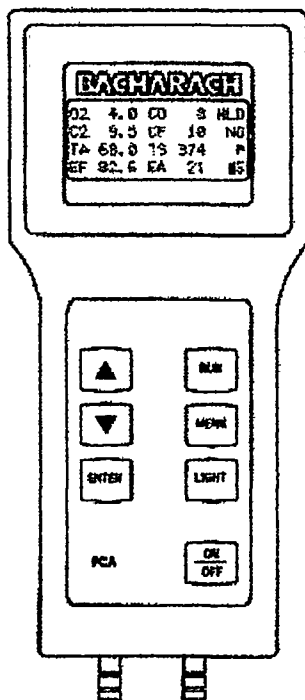
Carbon monoxide measurements in flue gases also must meet specific concentration standards. Though CO concentration standards have existed for appliances and other combustion systems for many years, lack of testing and misunderstanding of CO measurement has occurred.

As stated earlier, carbon monoxide can be measured in flue gases as CO PPM or CO PPM Air-free. Appliance manufacturers must produce units that comply with measurements of CO Air-free that are less than the listed maximums.

The following CO PPM Air-free measurements are offered along with common CO PPM standards found in jurisdictions where single sensor CO instruments are used.

Bacharach offers instruments that calculate CO PPM Air-free for you or you can use the following math. Remember that an oxygen (O₂) measurement must be taken in the flue gas along with CO PPM to calculate CO PPM Air-free. See the chart on page 32 for a CO Air-free reference where the math has been completed.

$$\frac{20.9}{20.9 - O_2} \times CO = CO \text{ Air Free}$$



ANSI Z21 (American National Standards Institute)

200 PPM CO Air-free is the maximum concentration from an unvented space heater.

ANSI Z21 EPA

400 PPM CO Air-free is the maximum allowed in furnace flue gas.

ANSI Z21

800 PPM CO Air-free is the maximum allowed for gas oven emissions.

To many technicians who have been and are performing combustion gas tests regularly, these concentrations are extremely high in reference to CO levels that can be expected from combustion systems finely tuned and maintained.

Additionally, CO Air-free measurement is not always performed due to lack of understanding about the requirement and lack of technicians' understanding about the importance of O₂ measurement in establishing the efficiency and safety parameters of

combustion systems.

This manual has discussed air measurement standards for CO in ambient air and flue gas standards for CO Air free. Monitoring flue gas readings commonly occurs across North America. The most criticism about flue gas testing often times comes from technicians or companies that do not test. One of the most common argumental phrases offered against testing goes something like this: *"All furnaces produce CO. If there is a vent on the furnace, you don't have to worry about it."*

Fortunately, many technicians and companies began and continue to test flue gases on furnaces, water heaters, ovens, boilers and other systems. It is easy to come to agreement with technicians who do test combustion gases routinely: **Carbon monoxide problems can be identified and minimized.**

It is common to find technicians, gas utility company personnel and others who do not understand the CO Air Free measurement and who often mix Air Free and non-Air Free measurement numbers.

Many technicians and inspectors utilize CO test instruments in the single sensor form (like the Bacharach Monoxor II). The action levels they use for how much CO is too much in flue gases is reported in CO PPM not CO PPM air free because the excess air in that flue gas sample has not been calculated out of the reading.

Therefore, the CO in PPM should be a significantly lower number than the CO Air Free measurement ceiling offered by ANSI, EPA, AGA or other governing bodies signifying those levels within that measurement parameter. (We will learn about flue gas content in the Combustion Analysis section of our training. However, knowing that an efficiently performing natural gas system's flue gases, as an example, generally contains 7 to 9% O₂.

Utilizing our CO Air Free formula, we would calculate the furnace ceiling amount of 400 PPM CO Air Free to be equivalent to around 225 PPM CO and higher when using single gas instrument.

The following concentrations reference measurement commonly found standards for gas systems across North America where single sensor instruments (like the Monoxor II) are being used to measure CO in combustion gases. Gas utility, Energy Programs, Home Inspection Companies, HVAC Companies and others commonly reference these concentrations. It is felt that these concentrations are readily achievable and within reasonable expectations of service work.

It is vitally important to discover and work within the local Authority of Jurisdictions standards for CO concentration limits in flue gas. All concentrations are referenced to a steady-state or stabilized condition of the systems operation with combustion gas sampling points before the draft hood of an appliance or other entries of dilution air. Test procedures and conditions are examined in the following sections of this manual.

Less than 100 PPM .. Gas furnaces, space and water heaters usually considered safe and left in operation. Annual tests. It is reported to be as low as 25 PPM in some weatherization programs. The more testing performed, the more the

15

September 16, 2011

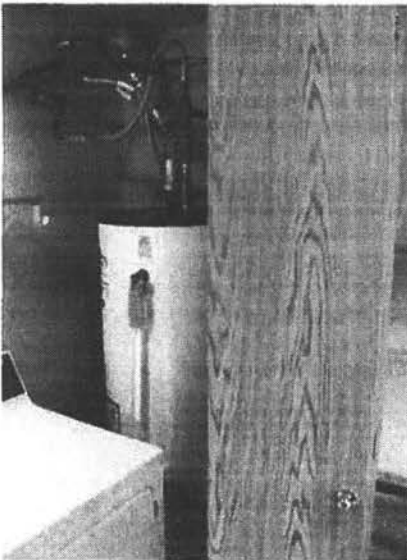


Tara Gaertner
Sagecrest Apartments
1805 East Overland
Meridian, ID

RE: WATER HEATER SITE INVESTIGATION

Dear Tara,

On September 7, 2011, Rick Everton of Engineering Consultants Inc. performed a Field Investigation at the Sagecrest Apartments regarding an issue with malfunctioning water heaters. This survey was performed after being contacted by Jon who had been experiencing premature failure of water heaters throughout the facility. Jon also stated that a service contractor had noted that the burners in the water heaters have been burnt out which has been attributed to lint from the clothes dryer plugging a ceramic disk in the heating chamber, ultimately this ceramic disk was removed so that it would no longer plug. Listed below is the report of the findings and potential items to resolve this concern.



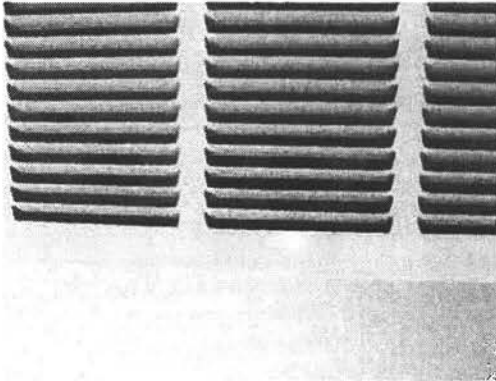
A concern expressed by Jon was if adequate combustion air has been provided to allow proper combustion for the water heaters, additionally there was a concern that the lint from the dryers would continue to cause issues with the water heaters.

The layout of the apartments have (3) different floor plans, floor plan A, B and C. In both floor plans A and B the water heater is in the same room as washer and dryer, see photo at left. While on site I looked at (1) of each of the (3) floor plans to get a look at a typical apartment layout. During the site investigation it was noted that combustion air is provided to each of the water heaters through 5"x19" grilles high and low. The current mechanical code requires (2) openings into the space. These openings are required to be a minimum of 1 square inch per 1,000 Btuh of burner capacity. The openings are also required to be (1) within 12" of the ceiling and (1) within 12" of the floor. The water heaters in these rooms are 40,000 Btuh, resulting a minimum of 40 square inches of opening. The 5"x19" grilles are estimated to be 50% free area or 47.5 square inches of free area. With this we can say that the current design meets the code minimum combustion air.

It should be noted however that in floor plan A only, it was observed that the wall behind the upper grille had not been entirely cutout and 4-5 approximately 2" holes have cut out thus limited the combustion air to the space, see photo on next page. This does not meet the intent of the code and would be considered a code violation.

We investigated this issue with some water heater manufacturers and found that AO Smith used this ceramic disk technology in their water heaters. The disk was used to achieve proper air/fuel mixture to the combustion chamber. As air would go through the disk it did tend to plug and they did experience some burner failures. They claim that they have since redesigned the burners and resolved this issue. If these disks were removed from the water heaters as suggested by Jon, the water heaters would not receive a proper air/fuel mixture. Improper air/fuel mixture will result in a rich or lean firing condition often resulting in catastrophic failure of the burner.

E00070214



Another issue contributing to this is that the combustion air is coming from inside the room and that air is potentially has lint particles. Even if the combustion air was brought in from outside it would still need to pass through the room to get to the water heater, thus entraining the lint particles. The only method to avoid this would be to furnish sealed combustion, high efficiency water heaters. These water heaters duct combustion air directly to the combustion chamber of the water heater. New flues and combustion air piping would need to be routed to each of these water heaters to retrofit them into the building. The cost of the new venting system and the initial cost of the water heaters make this a relatively expensive option.

In an effort to provide a best case fix of this issue without going to the expense of new sealed combustion water heater system we suggest the following.

- Fix combustion air intake in floor plan A to insure that proper combustion air is provided for. It should also be noted that we only looked at (1) of each floor plan and although plans B and C had proper combustion air intakes, all apartments should be field verified to insure all combustion air openings are unobstructed.
- Since the combustion chamber is near the bottom of the water heater and primarily where the air enters the water heater it is recommended that the water heaters be raised onto a platform. These platforms are used often in residential applications where the water heaters are placed in the garage. If the water heater is up off the floor we feel that this would minimize the amount of lint coming directly into combustion chamber that builds up on the floor.

Thank you for contacting us, if there is further need to contact us or if there are any questions please do not hesitate to contact us.

Sincerely,

Engineering Consultants, Inc.
Rick Everton

16

Michael J. Elia (ISBN 5044)
Craig D. Stacey (ISBN 7996)
MOORE & ELIA, LLP
Post Office Box 6756
Boise, Idaho 83707
Telephone: (208) 336-6900
Facsimile: (208) 336-7031

Attorneys for Defendants Sagecrest Multi-Family Property Owners' Association, Inc.,
Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of **PRIVATE**
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, et al.

Defendants.

Case No. CV-PI-1304325

**DEFENDANTS SAGECREST MULTI-
FAMILY PROPERTY OWNERS'
ASSOCIATION, INC., JON KALSBECK,
JAY ARLA, CHRISTOPHER SCHWAB
AND DAVID MEISNER'S ANSWERS TO
PLAINTIFFS' FIRST SET OF
INTERROGATORIES**

COME NOW Defendants Sagecrest Multi-Family Property Owners' Association, Inc.,
Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner, by and through their attorneys
of record, Moore & Elia, LLP, and pursuant to Rules 26 and 33 of the Idaho Rules of Civil
Procedure, hereby submits these Answers to Plaintiff's First Set of Interrogatories propounded
upon this Defendant.

DEFENDANTS SAGECREST MULTI-FAMILY PROPERTY OWNERS' ASSOCIATION, INC., JON
KALSBECK, JAY ARLA, CHRISTOPHER SCHWAB AND DAVID MEISNER'S ANSWERS TO PLAINTIFFS'
FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 8: Please provide the complete name, address and phone number of each current officer of the Sagecrest POA, and the name, address and phone number of each officer who held that position on November 10, 2012.

ANSWER TO INTERROGATORY NO. 8: The Sagecrest Multi-Family Property Owners' Association officers are as follows:

Jon Kalsbeek - President
Sagecrest Multi-Family Property Owners Association
1135 Terminal Way, Suite 209
Reno, Nevada 89502
925-228-7000

Christopher M. Schwab – Secretary
10353 Mary Ave.
Cupertino, California 45014
408-446-3761

Jay Arla – Vice President
5518 Painter GRN
San Antonio, Texas 78240
208-284-1330

David Meisner – Treasurer
2978 S. Bay Star Way
Meridian, Idaho 83642
208-286-2499

INTERROGATORY NO. 9: Please provide the complete name, address and phone number of each current director of the Sagecrest POA, and the name, address and phone number of each director who held that position on November 10, 2012.

ANSWER TO INTERROGATORY NO. 9: The Sagecrest Multi-Family Property Owners' Association directors are as follows:

Jon Kalsbeek - President
Sagecrest Multi-Family Property Owners Association
1135 Terminal Way, Suite 209
Reno, Nevada 89502
925-228-7000

Christopher M. Schwab – Secretary
10353 Mary Ave.
Cupertino, California 45014
408-446-3761

Jay Arla – Vice President
5518 Painter GRN
San Antonio, Texas 78240
208-284-1330

David Meisner – Treasurer
2978 S. Bay Star Way
Meridian, Idaho 83642
208-286-2499

INTERROGATORY NO. 10: Please state the date, time, and place of any communications in any manner, whether in person, via telephone, text messages, or e-mail between Defendants Sagecrest Multi Family Property Owners' Association, Inc.; Jon Kalsbek; Jay Arla; Chris Schwab; and/or David Meisner and First Rate or any of its officers, directors or employees related to, regarding or concerning water heaters, air handlers, carbon monoxide or air quality issues at Sagecrest.

ANSWER TO INTERROGATORY NO. 10: Defendant objects to this Request as the same is overbroad, unduly burdensome and harassing. Defendants, primarily through its President Jon Kalsbeek, had multiple communications with First Rate and its employees in the management of the Sagecrest complex beginning in 2010. Without waiving these objections, the parties to the communications and subject matter discussed is set forth within the documents and

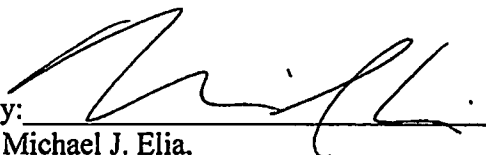
incident in coordination with counsel for the parties in this case, including inspections on January 7-8, 2013 and February 20-21, 2013.

INTERROGATORY NO. 16: What is the Defendants Sagecrest Multi Family Property Owners' Association; Jon Kalsbek, Jay Arla, Chris Schwab, David Meisner, or any other officers and/or directors of the Sagecrest Multi Family Property Owners' Association, Inc.'s understanding or contention with respect to how the incident in question occurred, and how and why McQuen Forbush was killed and Breanna Halowell sustained any injuries?

ANSWER TO INTERROGATORY NO. 16: Defendants object to this Interrogatory to the extent that it requests information protected by the attorney work product privilege. These Defendants refer to the Meridian Police Report and Ada County Coroner's report with regard to the incident, death and injuries of the Plaintiffs. Discovery is in its initial stages, and these Defendants will supplement this response pursuant to the Idaho Rules of Civil Procedure and this Court's Scheduling Order.

Dated this 26th day of July, 2013.

MOORE & ELIA, LLP

By: 

Michael J. Elia,
Attorneys for Defendants Sagecrest Multi-Family
Property Owners' Association, Inc., Jon Kalsbeek, Jay
Arla, Christopher Schwab and David Meisner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)	
HYMAS, individually and as)	
the natural parents of)	
PRIVATE FIRST CLASS McQUEN C.)	
FORBUSH, USMC (Deceased),)	
and BREANNA HALOWELL,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. CV PI 1304325
)	
SAGECREST MULTIFAMILY PROPERTY)	
OWNERS' ASSOCIATION, INC., an)	
Idaho non-profit corporation,)	
d/b/a SAGECREST MULTIFAMILY)	
PROPERTY OWNERS' ASSOCIATION,)	
et al.,)	
)	
Defendants.)	
)	

DEPOSITION OF TARA GAERTNER

January 2 and 3, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

1 A. Yes.

2 Q. To whom?

3 A. I don't -- I don't remember exactly.

4 Q. Okay. How many times did you voice
5 disagreement or communicate any disagreement with
6 the procedures?

7 A. I don't -- I don't know.

8 Q. Okay. When did you have concerns about,
9 using your words, testing in the kitchen?

10 When did you have those concerns?

11 A. When he -- when he came in and said that
12 that was the procedure, that that was what the
13 procedure was going to be.

14 Q. Why did you have those concerns?

15 A. Because it's not how I was shown by
16 Intermountain Gas or Express Plumbing.

17 Q. And did you communicate that with
18 Mr. Kalsbeek?

19 A. Yes.

20 Q. Okay. And you talked a little bit about
21 that yesterday.

22 What exactly was his response to that?

23 A. He assured us that he had spoken or
24 met -- I don't recall which -- to somebody from
25 Intermountain Gas and that they confirmed that

[303]

1 these procedures were correct.

2 Q. Okay. Anything else you remember about
3 that conversation and the testing procedures that
4 are set forth in the document?

5 A. Little minor things. Like, he was
6 comparing carbon monoxide to cigarette smoke and
7 how much cigarette smoke emitted -- how much carbon
8 monoxide cigarette smoke emitted.

9 Just things like that.

10 Q. Anything else specifically?

11 A. I don't remember anything else
12 specifically.

13 Q. Okay. Any other of the procedures that
14 you had concerns with other than testing on the
15 counter, kitchen counter?

16 A. Not that I can recall.

17 Q. Did anybody ever tell you not to follow
18 the procedures --

19 I can't remember what exhibit the
20 procedures are set forth in.

21 MR. CLARK: Hang on one second.

22 MR. HOWELL: Does anybody have that?

23 MR. CLARK: Yep. It's 53.

24 MR. HOWELL: Here it is. Exhibit 53. Thank
25 you.

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 7th day of January, 2014.



Andrea J. Wecker
ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.

My Commission Expires: 2-14-17

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as
the natural parents of
PRIVATE FIRST CLASS McQUEN C.
FORBUSH, USMC (Deceased),
and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTIFAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an
Idaho non-profit corporation,
d/b/a SAGECREST MULTIFAMILY
PROPERTY OWNERS' ASSOCIATION,
et al.,

Defendants.

Case No. CV PI 1304325

DEPOSITION OF TONY DROST

April 1 and 2, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

1 Department regarding what First Rate Property
2 Management -- regarding First Rate Property
3 Management's involvement?

4 MR. GREENER: Eric, can we know the date --
5 his best recollection of the date of the --

6 MR. CLARK: Okay. I'll ask that question
7 next.

8 Can you answer my question?

9 THE WITNESS: What was your question?

10 MR. CLARK: Can you read that.

11 (Record read by reporter.)

12 THE WITNESS: I -- I don't recall the
13 specifics.

14 Q. (BY MR. CLARK) Did you disclose to them
15 Tara's testing procedures?

16 A. I don't recall.

17 Q. Okay. Do you recall what date -- time
18 and date you met with the Meridian Police
19 Department?

20 A. It would have been around 8:00 in the
21 morning, but I don't recall the date. But it was
22 the same -- because from there, I went to
23 Intermountain Gas.

24 Q. Okay. I'm going to ask you about that.

25 Why did you go to Intermountain Gas

1 Company?

2 A. Because I felt like I got duped.

3 Q. Tell me why you felt like you got duped.

4 A. Because when Jon took control over the
5 CO and the water heater issues, he had come to the
6 office and met with the staff, had lots of
7 paperwork, had told me verbally that he had gone to
8 Intermountain Gas, that these are the procedures
9 that Intermountain Gas had created and he had
10 gotten other resources and this is how we should be
11 testing.

12 Q. Did he tell you that he believed that
13 Tara Gaertner was testing incorrectly at that
14 point?

15 A. No, not at that point.

16 Q. Okay. What did you --

17 Why did you go meet with Intermountain
18 Gas?

19 A. As I said, I felt I got duped, and I was
20 looking for confirmation. I --

21 Q. What did Intermountain Gas tell you?

22 A. Those -- that the procedures I provided
23 them were absolutely not their procedures.

24 Q. When you talk about "the procedures,"
25 are those the March 20th, 2012, carbon monoxide

1 Q. Did you have any independent knowledge
2 or did you do any type of investigation in terms of
3 which method of testing was better or safer for the
4 tenants, whether it was the ones that Mr. Kalsbeek
5 created or the ones that were originally put in
6 place by Express Plumbing?

7 A. What I -- I -- I was just --

8 I believed Jon. You know, he had gone
9 to Intermountain Gas, or he had stated that, and
10 he'd come to the office with lots of -- of
11 documentation, from what I understand, and said
12 he'd done a lot of research and that this was the
13 right way.

14 He was telling me they were doing it
15 wrong. I mean, I understand I don't have -- I
16 don't understand how to do that testing, so what he
17 described to me made sense. I did what he asked.
18 I called up Tara and said, "He says you're doing it
19 wrong," and instructed those two to get together
20 and work out those differences.

21 Q. But you knew that the way that Tara was
22 doing it was the way that Express Plumbing had told
23 her, correct?

24 A. That's what she had said, yes.

25 Q. And she also told you that that was the

1 out there.

2 But the fact that he purposely misled
3 everyone, that he had done this research and then
4 talked to Intermountain Gas and created this
5 procedure that would ensure safety is -- is
6 terribly wrong.

7 Q. Is there anything else that you can tell
8 me of why you think Mr. Kalsbeek was not acting in
9 the best interest of the Sagecrest Apartment
10 tenants?

11 A. We were stopped from installing water
12 heaters. We repeatedly asked to go and install
13 AC/DC CO detectors.

14 Those procedures did not -- did not
15 help.

16 Q. Would also being stopped from having
17 plumbers clean the water heaters be another reason?

18 MR. ANDERSON: Form.

19 THE WITNESS: I would believe that the
20 plumber would probably agree to that. I -- I don't
21 know enough about water heaters to know if what
22 they did and what was being done was any different.

23 Q. (BY MR. PALMER) When these
24 disagreements came up, the ones that we've talked
25 about with Mr. Kalsbeek, why didn't you go to the

411

[411]

To: Commerce Centre[ccbusinessspark@gmail.com]
Cc: Jay Arla[jay.arla@gmail.com]; VJK[aire1@pacbell.net]; Christopher Schwab[cmschwab@aol.com]
From: David Meisner
Sent: Wed 4/4/2012 3:23:54 AM
Subject: Re: Carbon Monoxide/ Testing procedures

After reading your explanation, I am good with the procedure as written.

On Apr 3, 2012 9:09 PM, "Commerce Centre" <ccbusinessspark@gmail.com> wrote:

David, if I understand you correctly, the numbers below are measurements in the flue- reference symptoms to expect. The 30 ppm is in the room if exposed for over 6 hours per the documents. The CO alarm activates at 70 ppm in the room after 4 hours of exposure. Where the 30 ppm figure came from was management at Intermountain gas and their procedures which were in the attachment. Management stated to me directly, they do not test the flue, their concern is the room condition. Bear in mind, in talking with Shiela, Tara, and others, the service techs all do it differently and have different standards. One tech told Shiela that he would condemn the unit at 4 ppm in the flue, this would be wrong on all accounts. Hence, these procedures are to arm Tara and others with information to informed as to what the techs procedures are by their manual.

This procedure is based on information from Intermountain Gas, internet, Shiela and Tara's experience when this happened. They believe this is a very conservative approach. The important point is to show we are taking action to prevent future situations, by being proactive. Remember, none of FRPM other units that they manage, nor any that we manage have had this problem or go through this process, not even monitoring rooms or flues ppm. Does this clarify or muddy the waters. Want to make sure we all agree on how we are operating in the best interest of the owners and tenants. I am open to suggestions if we need to change any thing.

Virginia and Jon

On Tue, Apr 3, 2012 at 12:39 PM, David Meisner <dbmeisner@gmail.com> wrote:

30 ppm in the room seems low (and a good number) when compared with the numbers Shiela provided when we first replaced several of the water filters at Sagecrest. It seems the procedure would be acceptable, but this issue scares me and I would like to be as safe as possible. I believe Intermountain Gas would force the water heater "On" and then measure directly at the flue without taking a measurement in the room. This is what I observed when Intermountain Gas checked one of our units. I don't know if that is what the other owners would

want, but I would be o.k. with measuring at the flue for our units whether or not we measure below 30ppm on the kitchen counter. We've replaced 75% of our water heaters and we have the two bedroom/one bath units that do not have the water by the clothes dryer.

Reference Numbers from Shiela's previous email when several water heaters were replaced:

200 ppm- Slight headache, tiredness, dizziness, nausea after 2-3 hours

400 ppm- Frontal headaches within 1-2 hours, life threatening after 3 hours

800 ppm- Dizziness, nausea and convulsions within 45 minutes.
Unconsciousness within 2 hours. Death within 2-3 hours.

1,600 ppm- Headache, dizziness and nausea within 20 minutes. Death within 1 hour.

3,200 ppm- Headache, dizziness and nausea within 5-10 minutes. Death within 30 minutes.

6,400 ppm- Headache, dizziness and nausea within 1-2 minutes. Death within 10-15 minutes.

On Tue, Apr 3, 2012 at 11:20 AM, Commerce Centre
<ccbusinesspark@gmail.com> wrote:

Chris, Thank you for the clarification, must have been an oversight on my part. The attached pdf has the final version of the WH testing procedures, this might clear things up. This would be the version that goes to owners.

Virginia and Jon

On Mon, Apr 2, 2012 at 11:03 PM, Christopher Schwab
<cmschwab@aol.com> wrote:

I just think that any testing that our people are doing, should be done to some recognized standard (both for the safety of the tenants and for our own protection). If we are using CO concentrations, times, and procedures

recommended by Intermountain Gas, that's fine, but we should mention Intermountain Gas in any correspondence that we put out. The ppm portion refers to Sheila Thomason's email that just had 30 not 30 ppm and 100+ not 100+ ppm, etc. Without the ppm, the numbers are meaningless.
-Chris

On Apr 2, 2012, at 9:34 PM, Commerce Centre
<ccbusinesspark@gmail.com> wrote:

I will get something sent out to owners regarding this information. This is not from intermountain Gas just based on their procedures and parameters. Chris, not sure what this sentence refers to (It should also have the units (ppm) along with the values (30 ppm, 100+ ppm, etc).
This could potentially be serious and we want to be proactive and not reactive.

.Virginia and Jon

On Mon, Apr 2, 2012 at 7:57 AM, Christopher Schwab
<cmschwab@aol.com> wrote:

I just wanted to be sure, is this testing procedure the one that was recommend by Intermountain Gas? If it is, I think it should be stated on anything that goes out to owners or tenants. It should also have the units (ppm) along with the values (30 ppm, 100+ ppm, etc). I also think that in addition to stating that the hot water should be run and the heater on for 5 minutes, that the doors and windows should be closed (I assume that the gas company would do this). I guess that I would stick with the 24 hours, or maybe even less, and then let the gas company make the decision on whether to shut down or not. Seems that if a problem is detected, action should be taken sooner rather than later.
-Chris

On Apr 1, 2012, at 8:56 PM, Jay Arla <jay.arla@gmail.com> wrote:

I think we should share this information to all owners so they are aware of the procedure and what is expected of them. Maybe we should change the response time from the owners to 48hr as 24 hr may not be realistic. I also vote to include the attached documentation as well, the more we educate the owners the better I think.

Sorry to respond late on this.

On Wed, Mar 21, 2012 at 8:23 PM, VJK <aire1@pacbell.net> wrote:

Update on Water Heater issues and CO testing. As you have been aware, there have been issues with readings of CO levels inside units and flues. This has, in the past, resulted in the gas company shutting of the gas until the issue can be resolved. Currently, all units are in compliance, subject to change due to many variables. On going testing and procedures are being modified to make sure tenants and owners are protected, we are being proactive.

Attached are documents supporting the attached procedures below. These procedures are being implemented to prevent serious health conditions and hopefully find issues well in advance of a serious health hazard arising. These procedures were worked out with the on-site managers, the maintenance supervisor, and Virginia and I.

Please review and direct any questions to us. We are thinking these procedures need to be sent to owners to bring them up to date and aware of how Water Heaters are being handled, in addition, what is expected of owners. Should the gas company be called, the unit will have no gas service which will most likely result in the loss of a tenant.

Thank you for reviewing, let us know if we can proceed with presenting the email information below. The documentation is for the board, let me know if it should be included.

Virginia and Jon

--- On Wed, 3/21/12, Sheila <sheila@frpmrentals.com> wrote:

From: Sheila <sheila@frpmrentals.com>
Subject: Carbon Monoxide/ Testing procedures
To: "sagecrest" <sagecrest@frpmrentals.com>, aire1@pacbell.net
Cc: "Lizz" <Lizz@frpmrentals.com>, "Tony Drost" <tony@frpmrentals.com>

Date: Wednesday, March 21, 2012, 1:04 PM

Attached is the paperwork Jon brought in regarding carbon monoxide. Below is what I have for the procedures:

Air filters are being changed monthly 10-12 buildings at a time starting next month. This will prevent overtime and spread the 3-4 day process out throughout the months.

During the filter changes the carbon monoxide detector is to be turned on and set somewhere in the room so the air can be tested while the filter is changed. If the reading is 30 or above in the room a proper test must be done in the flue of the water heater. Be sure to turn on all hot water in the apartment so water heater can kick on and run for 5 minutes prior to testing the air in the flue.

If the air in the flue tests 100+ call the owner to discuss replacement. Follow up with an email for documentation. Install a carbon monoxide/fire detector combo if one isn't already present. If water heater isn't replaced conduct proper test in the flue in 30 days. Continue to do so every 30 days until water heater is replaced. Educate tenants.

If air in the flue tests 300+ contact owner and inform immediate water heater replacement is required. If owner refuses contact Intermountain Gas to come test and shut the water heater down if needed. If you are not able to get a hold of the owner and haven't received a response via phone or email within 24 hours contact Intermountain Gas to test and shut down. Follow up with email to the owner. Educate tenants.

Carbon monoxide/fire detector combos are to eventually be installed in every unit to replace the smoke detector in the hallway. This is to be done on turnovers, during preventative maintenance, lease renewals, or if smoke detector is faulty in a unit until each one has one.

Thanks,
Sheila Thomason
Maintenance Supervisor
First Rate Property Management
(208) 577-5201
(208) 321-1901 fax

ORIGINAL

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NO. _____
A.M. _____ P.M. 443

DEC 04 2014

CHRISTOPHER D. RICH, Clerk
By TENILLE RAD
DEPUTY

Attorneys for Defendants Jon Kalsbeek,
Jay Arla, Christopher Schwab and David Meisner

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

**REPLY IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**

COME NOW the above-captioned Defendants, Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner (collectively, the "POA Officers"), by and through their counsel of record, John M. Howell of the firm Brassey, Crawford & Howell, PLLC, and hereby submit this reply in support of their Motion for Summary Judgment (the "Motion").

I. INTRODUCTION

The Motion asks the Court to enter summary judgment in favor of the POA Officers with regards to all of Plaintiffs' remaining claims against them. Notably, Plaintiffs do not oppose the Motion with respect to Defendants Jay Arla, Christopher Schwab and David Meisner. As to Mr. Kalsbeek, there is no dispute that he was significantly involved in the events at Sagecrest leading up to the November 10, 2012 incident. There is also no dispute that the claims made against Mr. Kalsbeek arise from his actions as the President of the Sagecrest POA. The critical question is whether Mr. Kalsbeek's actions created an independent cause of action against him. For the reasons stated herein, none of the Plaintiffs arguments in opposition to the Motion are availing, and the Motion is thus appropriately granted thereby dismissing all of the POA Officers.

II. RESPONSE TO PLAINTIFFS' REPRESENTATION OF UNDISPUTED FACTS

Plaintiffs argue that the evidence in this case establishes that Mr. Kalsbeek: (1) had knowledge of CO issues at Sagecrest over one year prior to the November 10, 2012 incident; (2) took charge of the response to the CO issues; (3) created flawed CO testing procedures; (4) did not reasonably rely on any professional reports and (5) generally did not respond appropriate to the known problems. In so arguing, Plaintiffs omitted key undisputed evidence thereby effectively mischaracterizing the evidence. By commenting on the evidence submitted by Plaintiffs and by reciting additional undisputed facts herein, the POA Officers seek only to clarify the record, but do not contend that any genuine issues of material fact are created thereby.

The crux of the analysis is to determine whether Mr. Kalsbeek has any independent, individual liability for his conduct. Accordingly, much of the evidence presented by Plaintiffs is irrelevant and, therefore, immaterial. Plaintiffs' burden is well established. Plaintiffs must raise a genuine issue of material fact in order to defeat summary judgment. *See Idaho R. Civ. P. 56.*

It is undisputed that the decision to replace water heaters in the units at Sagecrest was a decision to be made by a unit's owner. *See, e.g.*, July 29, 2011 email from Sheila Thomason to various owners attached to the *Dec. of Tyson E. Logan in Opp. to Defendants Kalsbeek, Arla, Schwab, and Meisner's Mot. for Summ. J.* ("Logan Dec."), Ex. 4, FR7100 ("Please let me know which building you own and if I have approval to replace your water heater(s) listed."); August 3, 2011 email exchange between Mr. Kalsbeek, Mr. Drost and others attached to the *Aff. of John M. Howell* ("HowellAff."), filed concurrently herewith, Ex. A (clarification that it is the owners decision on how to handle the situation and owner is responsible for the cost); *Depo. of Liz Loop*, Vol. II, 332:8-14 (decision to replace water heaters was a decision for the owner) (attached to the *Aff. of Robert A. Mills in Support of Deft. Drost's Mot. for Summ. J.* ("Mills Aff."), Ex. S). Plaintiffs previously asserted that Mr. Switzer, "through his agent First Rate, retained the control and responsibility to maintain the water heater in Sagecrest apartment 4624 . . . By the lease agreement, Switzer retained the control and responsibility to repair appliances including the dangerous water heater." (*Pltfs. ' Resp. in Opp. to Switzer's Mot. for Summ. J.*, 2.)

On November 9, 2011, Ms. Gaertner emailed Mr. Switzer setting forth the recommendation from Engineering Consultants, Inc. and providing Mr. Switzer with options including replacing the water heater at a cost of \$650 and installing a CO detector at a cost of \$62.48 per unit. (*Dec. of Eric R. Clark in Opp. to Defendant Switzer's Mot. for Summ. J.* ("Clark Dec."), Ex. 11, FR3001-3002) Mr. Switzer chose not to implement any of the options. (*See id.*, Ex. 12; *Pltfs. ' Resp. in Opp. to Switzer's Mot. for Summ. J.*, 5.)

First Rate had the authority to incur charges up to \$250.00 to maintain Apartment 4624. (*See First Rate's contract with Mr. Switzer, attached to the Clark Dec.*, Ex. 1, 5.) First Rate did not have

to obtain an owner's permission for charges under \$250.00. (*See Howell Aff.*, Ex. B (*Dep. of Tara Gaertner*), 308:25 - 309:21.

Mr. Kalsbeek did not have the ability to control the replacement of water heaters nor the installation of hard-wired CO detectors complex-wide. Plaintiffs' suggestion that he did is directly contrary to the undisputed evidence that was omitted by Plaintiffs. Admittedly, Kalsbeek did have such control with respect to his own units. Moreover, to the extent Plaintiffs argue that the POA had such a duty, there is no evidence to establish that such a duty is imputed to Kalsbeek as an individual.

As articulated in the Complaint and the subsequent amendments thereto, Mr. Kalsbeek was acting at all relevant times in his capacity as the President of the POA. This fact is undisputed. Indeed, the contract between First Rate and the POA designated Mr. Kalsbeek as the authorized representative of the POA to give and receive notices, approvals and instructions. (*See Mills Aff.*, Ex. G.) Accordingly, Mr. Kalsbeek, in his capacity as the Present of the POA, routinely communicated with First Rate employees regarding the management of Sagecrest, which is evidenced by the numerous emails contained in the record.

Plaintiff's contend that Mr. Kalsbeek drafted the carbon monoxide procedures and routinely characterize the procedures as "John's Procedures." Plaintiffs omit evidence that Mr. Kalsbeek met with First Rate employees to discuss the procedures and there are numerous emails circulated regarding the procedures between the POA Officers and First Rate employees. (*See Clark Dec.*, Ex. 17; *Logan Dec.*, Exs. 9, 19.) Hence, the evidence does not support Plaintiffs' suggestion that the procedures were entirely Mr. Kalsbeek's creation or that he made some type of unilateral decree that his procedures must be implemented. Rather, it was a cumulative effort between First Rate and the POA Officers utilizing not only everyone's input, but also various resources such as those provided

by Intermountain Gas which were circulated to the First Rate employees and the other POA Officers.
Id.

Plaintiffs indicate that Mr. Kalsbeek received a document in October 2012 summarizing CO testing at Sagecrest which revealed a reading of 100ppm in Apartment 4624. (*See Pltfs. ' Resp. in Opp. to Defendants Kalsbeek, Arla, Schwab, and Meisner's Mot. for Summ. J.*, 4.) To clarify, the reading of 100 ppm was obtained by Ms. Gaertner on March 9, 2012. (*See Clark Dec.*, Ex. 13; *Pltfs. ' Resp in Opp. to Switzer Mot. for Summ. J.*, 5.) Thereafter, on March 12, 2012 Intermountain Gas came to Sagecrest at Ms. Gaertner's request and re-tested the water heater in Apartment 4624. (*See Aff. of Tony Drost in Support of Deft. Drost's Mot. for Summ. J.*, ¶ 55.) Intermountain Gas obtained a reading of 19 ppm, which deemed it a normal reading. *Id.* (*citing Mills Aff.*, Ex. N.). "As a result of the fact that Intermountain Gas found no high gas readings or concerns regarding the water heaters that were tested (including the water heater in Unit 4624), further water heater replacement efforts at that specific time were halted, because, at that point in time, none of the water heaters at the Sagecrest Complex had any confirmed high CO readings." (*Id.*, ¶ 56.)

With respect to the October 2012 time frame and whether the response was appropriate, Plaintiffs omit that Ms. Gaertner had a conversation with the Meridian Fire Marshall on October 30, 2012, during which she explained the measures which were being taken regarding CO detectors, water heater replacements, implementation of the recommendations of the mechanical engineer, and testing for CO every 90 days. (*Id.*, ¶ 75.) The Fire Marshall stated that these steps seemed "diligent" to him, and that he was happy with the efforts being undertaken. *Id.*, ¶ 76 (*citing Mills Aff.*, Ex. F.).

III. DISCUSSION

A. *Negligence Claims*

Plaintiffs first argue that there exist genuine issues of material fact with regards to the question of whether Mr. Kalsbeek owed the Plaintiffs a duty of care, a necessary element of a negligence claim under Idaho law. (*Pltf. 's Resp. in Opp. to Defts. ' Mot. for Summ. J.* ("Resp."), 13.)

Plaintiffs' express confusion at the POA Officers' emphasis on the concept of individual duty. (*Resp.*, 13 n.3.) Under Idaho law, a claim of negligence requires proof of "(1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *Beers v. Corporation of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 685, 316 P.3d 92, 97 (2013).

Thus, Plaintiffs must prove that Mr. Kalsbeek, as an individual, owed them a duty of care recognized by law. It is not sufficient for the Plaintiffs to apply the transitive property to duty analysis by arguing (1) because the Sagecrest POA owed them a duty, and (2) the POA Officers are officers of Sagecrest, (3) the POA Officers individually owed them a duty distinct from the duty owed them by Sagecrest POA. A duty as between Sagecrest POA and the Plaintiffs is not a duty between Mr. Kalsbeek individually and the Plaintiffs. This distinction was discussed by the California Supreme Court in *Frances T. v. Village Green Owners Assn.*, 42 Cal.3d 490, 723 P.2d 573 (Cal. 1986):

But like any other employee, directors individually owe a duty of care, independent of the corporate entity's own duty, to refrain from acting in a manner that creates an unreasonable risk of personal injury to third parties. The reason for this rule is that otherwise, a director could inflict injuries upon others and then escape liability behind the shield of his or her representative character, even though the corporation might be insolvent or irresponsible. Director status therefore neither immunizes a person from individual liability nor subjects him or her to vicarious liability.

In *Haidinger-Hayes*, we also restated the traditional rule that directors are not personally liable to third persons for negligence amounting merely to a breach of duty the officer owes to the corporation alone. “[T]he act must also constitute a breach of duty owed to the third person.... More must be shown than breach of the officer's duty to his corporation to impose personal liability to a third person upon him.” 1 Cal. 3d at p. 595, 83 Cal. Rptr. 418, 463 P.2d 770. In other words, a distinction must be made between the director’s fiduciary duty to the corporation (and its beneficiaries) and the director’s ordinary duty to take care not to injure third parties. The former duty is defined by statute, the latter by common law tort principles.

Id. at 505-06, 723 P.2d at 581-82 (internal citations and quotations partially omitted).

Some courts have even applied the business judgment rule to third party claims such as those brought by the Plaintiffs. In *Montclair United Soccer Club v. Count Me In Corp.*, 2009 WL 2985475 (W. D. Wash. 2009), a dispute arose regarding the provision of online registration services for youth sports leagues. *Id.* at *1. In addition to claims against the defendant corporation, the plaintiff brought claims of breach of contract, breach of good faith and fair dealing, violation of Washington’s unfair and deceptive trade practices statute, conversion, and unjust enrichment against Drayton, the defendant corporation’s founder and CEO, as an individual. *Id.* at *2. Drayton moved to dismiss the claims against him as an individual, asserting the protections of the business judgment rule: “Drayton first argues that he cannot be held personally liable to Plaintiff under any of the causes of action in Plaintiff’s Amended Complaint because the business judgment rule shields him, as a corporate officer, from liability for management decisions that were made within his authority and in good faith.” *Id.* at *3. The plaintiff argued that the business judgment rule applies only to claims brought by a corporation or its shareholder, not by third parties. *Id.* at *4. The court ruled that the business judgment rule applied, though it found issues of fact regarding the rule’s applicability to the facts of the case:

The Washington Supreme Court has said that the purpose of the business judgment rule is to provide sufficient breathing space [to business executives] for making discretionary decisions, by preventing judicial second-guessing of such decisions

through the medium of a tort action. This purpose would appear to be served by applying the business judgment rule to tort actions by third parties.

Id. at *4 (internal quotations and citations omitted). *C.f. Casper v. American Intern. South Ins. Co.*, 336 Wis. 2d 267, 309, 800 N.W.2d 880, 901 (Wis. 2011) (“However, the business judgment rule, as expressed in *Einhorn* and in Wis. Stat. § 180.0826, defines a corporate officer’s duties to a company’s shareholders, not to third parties. Thus, the business judgment rule does not necessarily immunize a corporate executive from liability for negligence. Nonetheless, the very existence of a business judgment rule reflects public policy that corporate officers are allowed some latitude to make wrong decisions without subjecting themselves to personal liability.” (emphasis added)).

The Sagecrest POA is a small corporation, with the officers thereof acting in close proximity to individuals such as the Plaintiffs. The absurdity of attempting to attribute corporate actions and duties to an individual merely because he is an officer is evident when considered in the context of a non-profit corporation much larger than the Sagecrest POA. For example, St. Luke’s as a non-profit corporation undisputedly owes a duty to clear its sidewalks of ice. The CEO of St. Luke’s, however, does not owe an individual duty to clear icy sidewalks to literally hundreds of thousands of unique visitors to St. Luke’s simply because he is an officer of St. Luke’s and he is aware that ice sometimes poses a hazard to St. Luke’s visitors. If the St. Luke’s in Hailey fails to clear the ice from its sidewalk, resulting in a visitor’s slip and fall, a plaintiff may not sue the St. Luke’s CEO on an individual basis simply because he is an officer of St. Luke’s.

Plaintiffs cite cases in which a corporate officer is held liable for his own fraudulent or negligent actions (*Resp.*, 13 n.3), and the POA Officers have no disagreement. To the extent the St. Luke’s CEO decides to pick up a shovel and go outside to personally clear ice from the sidewalks, the CEO may be individually liable if he clears the ice in a negligent manner. In such instance the CEO has personally engaged in an undertaking and, as a result thereof, individually assumed a duty

of care with regards to persons walking over St. Luke's sidewalk that he is clearing. The CEO is liable for his own tortuous conduct.

The crux of the inquiry with regards to Mr. Kalsbeek is thus whether he engaged in conduct equivalent to the St. Luke's CEO picking up a shovel and personally clearing ice, thereby assuming a duty with regards to Plaintiffs. The undisputed facts do not support such a conclusion. Significantly, the Plaintiffs cite no evidence that Mr. Kalsbeek ever stepped foot in Apartment 4624.

In determining whether Mr. Kalsbeek individually assumed a duty, it must be remembered that a corporation such as the Sagecrest POA can only act through its officers and agents. The acts of Mr. Kalsbeek cited by Plaintiffs are the very acts one would expect the president of a corporation to take in fulfilling his fiduciary duties to the corporation. Mr. Kalsbeek is only in this case because he was an officer of the POA; there would have been no independent basis to bring a claim against Mr. Kalsbeek but for his role as an officer of the POA.

The Plaintiffs state that "Mr. Kalsbeek was aware of repeated incidents in which individuals at the Sagecrest apartment complex were exposed to harmful - and even potentially lethal - levels of CO." (*Resp.*, 14.) Simple knowledge of a potential safety issue is not analogous to personally undertaking to remedy it; Plaintiffs are arguing that the St. Luke's CEO individually assumes a duty of care with regards to each of hundreds of thousands of visitors who traverse the icy sidewalks.

The Plaintiffs state that "[t]he CCRs permitted the Directors, in their sole discretion, to undertake maintenance or repairs in unit interiors to prevent exactly this type of harm." (*Resp.*, 14.) While arguably technically correct, the Plaintiffs do not cite any evidence that the POA Officers personally went into any apartments to undertake maintenance or repairs. The record is devoid of evidence that the POA Officers were personally removing water heaters or installing CO detectors. Corporate authority to direct an action is not analogous to personally taking the action; Plaintiffs are

arguing that the St. Luke's CEO who has the authority to require ice removal from a St. Luke's sidewalk individually assumes a duty of care with regards to each of hundreds of thousands of visitors who traverse the icy sidewalks.

The Plaintiffs state that "Mr. Kalsbeek personally interceded and micromanaged issues regarding unit interiors. However, he failed to ensure that the water heater in unit 4624 was replaced, or that a hard-wired CO detector was installed in unit 4624." (*Resp.*, 14.) Again, the Plaintiffs do not cite any evidence that Mr. Kalsbeek promised or began to personally install a water heater or hard-wired CO detector in unit 4624; Plaintiffs are arguing that the CEO of St. Luke's owes an individual duty to someone who falls on an icy sidewalk in Nampa or Hailey because he did not personally remove the ice therefrom, or check to ensure that ice removal was accomplished.

The Plaintiffs state that Mr. Kalsbeek "even implemented CO testing procedures that any reasonable person would have known were severely flawed and bore little resemblance to the sources that he supposedly relied on." (*Resp.*, 14.) The Plaintiffs erroneously equate an exercise in corporate authority, namely the drafting of a policy, with an individually assumed undertaking. A corporate officer that drafts a policy does not personally assume a duty with regards to every person that the policy might affect; Plaintiffs are arguing that the CEO of St. Luke's who drafts an ice removal policy individually assumes a duty of care with regards to each of hundreds of thousands of visitors who traverse the icy sidewalks. *See also Nation v. State, Dept. of Correction*, 144 Idaho 177, 189, 158 P.3d 953, 965 (2007) ("[A]n agency's internal handbook must be construed as internal guidelines if not adopted under the procedures set out in IDAPA; it does not have the force and effect of law and does not give rise to a cause of action based on an alleged violation." (internal quotation omitted)); *Cleveland Reg'l Med. Ctr., LP. v. Celtic Props., L.C.*, 323 S.W.3d 322, 351 (Tex. Ct. App. 2010) ("A company's internal policies or procedures will not create a negligence duty where

none otherwise exists.”); *Owens v. Comerica Bank*, 229 S.W.3d 544, 547 (Tex. Ct. App. 2007) (“The Texas Supreme Court has refused to create a standard of care or duty based upon internal policies, and the failure to follow such policies does not give rise to a cause of action in favor of customers or others.”)

The Plaintiffs state that Mr. Kalsbeek “undertook to coordinate water heater replacement and hard-wired CO detector installation; to select or refuse to select a professional to perform preventive maintenance; to control the testing procedures used at the apartments; and to regulate the information provided to owners and tenants.” (*Resp.*, 15.) The record is devoid of evidence that Mr. Kalsbeek promised or began to personally install a water heater or hard-wired CO detector in unit 4624, or that Mr. Kalsbeek personally performed preventive maintenance or engaged in CO testing in unit 4624. As is becoming readily apparent, yet again these allegations fail to allege an individually assumed undertaking on the part of Mr. Kalsbeek personally, as opposed to a corporate officer making decisions and directing corporate action in fulfillment of fiduciary obligations to the corporation.

Though not directly applicable to the claims brought by the Plaintiffs against Mr. Kalsbeek, as such claims are not contractual in nature, Idaho law regarding agency in the context of corporate contracting is illustrative. It is axiomatic that where a party contracting with an agent of a corporation is aware of the agency relationship, the agent is not personally liable on the contract. The corporation is the contracting party, not the agent, but the corporation acted through its agent. The fact that the agent signed the contract does not render the agent personally liable thereon. *See, e.g., Agrisource, Inc. v. Johnson*, 156 Idaho 903, 332 P.3d 815, 820 (2014) (“[A]n agent is not liable when, at or before the time of the contact, he discloses that he acts as his principal’s agent. In other words, a principal is disclosed when the other party has notice of two facts: (1) the agent is acting for a principal and (2) the principal’s identity.” (internal citations omitted)).

B. Idaho Code § 30-3-85

Plaintiffs argue that Mr. Kalsbeek is not entitled to immunity as a matter of law pursuant to Idaho Code § 30-3-85. It bears repeating that Mr. Kalsbeek's immunity under § 30-3-85 is only implicated if he did not assume a duty of care on an individual basis with regards to the Plaintiffs.

First, Plaintiffs argue that Mr. Kalsbeek has not shifted his summary judgment burden with regards to his immunity under Idaho Code § 30-3-85. This argument is premised wholly on the contention that Mr. Kalsbeek's affidavit in support of the Motion is inadmissible. The Plaintiffs rely on the briefing in the Motion to Strike, and the POA Officers will do likewise. For the reasons stated in the *Response in Opposition to Motion to Strike dated December 4, 2014*, Mr. Kalsbeek's affidavit is admissible and properly shifts the summary judgment burden to the Plaintiffs because the testimony set forth therein, based on his personal knowledge, represents his subjective beliefs and intent with regards to his good faith conduct in this case.

Second, Plaintiffs argue that there exist genuine issues of material fact with regards to Mr. Kalsbeek's conduct and the applicability of § 30-3-85: "a reasonable jury easily could conclude that Mr. Kalsbeek did not act prudently and in good faith." (*Resp.*, 17.) In support of this argument, Plaintiffs primarily cite the same evidence cited in support of their position that Mr. Kalsbeek assumed a duty of care:

Mr. Kalsbeek was aware of a spreadsheet that showed that numerous units, including Apartment 4624, had tested high for CO . . . He was aware of a spreadsheet that showed that 128 of 192 units - including Apartment 4624 - did not have hard-wired CO detectors. . . . Mr. Kalsbeek undertook to coordinate the global replacement of water heaters and the installation of hard-wired CO detectors. He undertook to decide which professional preventative maintenance contractor, if any, would be hired to service water heaters at Sagecrest. He undertook to formulate CO testing procedures, and implemented procedures that he knew or should have known grossly deviated from the source material that he supposedly relied on. He also undertook to control - and limit - the flow of information about the deadly CO threat to owners and tenants.

(*Resp.*, 17.)

Regarding the spreadsheet, the undisputed facts discussed in Sec. II, *supra*, demonstrate (1) that Intermountain Gas Company tested Apartment 4624 for CO subsequent to Ms. Gaertner's high reading and obtained a normal reading; and (2) unit owners or First Rate pursuant to its contract with the unit owners, not Mr. Kalsbeek, had the authority to install hard-wired CO detectors.

The remaining allegations are that because Mr. Kalsbeek undertook various measures or made decisions regarding CO issues at Sagecrest, therefore he acted in bad faith. Though Mr. Kalsbeek contends that these acts do not constitute a legal undertaking, these acts, in and of themselves, simply do not support the conclusion that Mr. Kalsbeek acted in bad faith. Indeed, such actions are the expected actions of the president of a corporation, and to have declined to act in any manner would have been a much greater indicator of bad faith than the actions that Mr. Kalsbeek did take. The Plaintiffs' disagreement with Mr. Kalsbeek's decisions, with the heightened clarity of hindsight, is not proof that Mr. Kalsbeek's decisions were rendered in bad faith. Rather, such actions fall squarely within the latitude afforded officers of non-profit corporations. *See Casper*, 336 Wis. 2d at 309, 800 N.W.2d at 901 ("the very existence of a business judgment rule reflects public policy that corporate officers are allowed some latitude to make wrong decisions without subjecting themselves to personal liability."). *See also, e.g., In re Crimson Exploration Inc. Stockholder Litigation*, 2014 WL 5449419, *23 (Del. Ch. 2014) ("Mere disagreement with the Board's ultimate decision to enter into a merger, rather than proceed as a stand-alone company, however, does not show bad faith by the Board members."); *Cameron Mut. Ins. Co. v. Lewellen*, 2014 WL 4662298, *2 (E. D. Ark. 2014) ("Six years of pre-suit wrangling would be draining for anyone. But this record shows contentious long-term disagreement-total loss versus repairs-between strong-willed parties, not bad faith."); *Rupcich v. United Food and Commercial Workers International Union Local 881*,

2014 WL 4898144, *7 (N. D. Ill. 2014) (“The Union’s choice not to rely on *Mitchell* is simply another example of a disagreement in strategy that does not rise to the level of bad faith.”).

C. *Intentional Infliction of Emotional Distress*

Plaintiffs argue that Mr. Kalsbeek is not entitled to judgment as a matter of law with regards to their claim of intentional infliction of emotional distress. The POA Officers have briefed this issue at length and will rely on that briefing instead of repeating it here. *See Mem. in Support of Defts. Kalsbeek, Arla, Schwab and Meisner's Mot. to Dismiss Intentional Infliction of Emotional Harm Claim; Reply in Support of Defts. Kalsbeek, Arla, Schwab and Meisner's Mot. to Dismiss Intentional Infliction of Emotional Harm Claim; Mem. in Support of Mot. for Summ. J., Sec. IV. B.*

The Court is well aware that it has the authority to rule as a matter of law that a given set of facts is not sufficiently extreme or outrageous as to support a claim of intentional infliction of emotional distress, and that it has previously ruled that the POA Officers conduct was not sufficiently extreme or outrageous with regards to the proposed Hymas plaintiffs.

Similarly, the record does not support the conclusion that Mr. Kalsbeek’s conduct was extreme or outrageous with regards to the Plaintiffs. Additionally, Mr. Kalsbeek has properly and admissibly testified that at no point did he have the subjective intent to inflict emotional harm upon the Plaintiffs, thereby shifting the burden on this issue to the Plaintiffs. Plaintiffs have not carried their burden in rebuttal.

IV. CONCLUSION

For the reasons stated herein, the Motion is appropriately granted in all respects.

DATED this 4th day of December, 2014.

BRASSEY, CRAWFORD & HOWELL, PLLC

By 

John M. Howell, Of the Firm
Attorneys for Defendants Jon Kalsbeek, Jay
Aria, Christopher Schwab and David Meisner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of December, 2014, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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John M. Howell

ORIGINAL

NO. _____
A.M. _____ P.M. 443

DEC 04 2014

CHRISTOPHER D. RICH, Clerk
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Attorneys for Defendants Jon Kalsbeek,
Jay Arla, Christopher Schwab and David Meisner

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

AFFIDAVIT OF JOHN M. HOWELL

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

John M. Howell, being first duly sworn upon oath, deposes and states as follows:

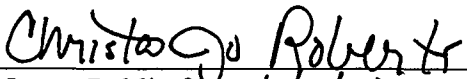
1. I am over 18 years of age and I am competent to make this Affidavit.
2. I am an attorney of record for the Defendants Kalsbeek, Arla, Schwab and Meisner in the above-captioned case.
3. Attached hereto at Exhibit A are true and correct copies of documents produced in discovery, bates stamped as FR00444-00445, and also marked as Exhibit 108 and utilized in the depositions taken in this matter.
4. Attached hereto at Exhibit B are true and correct copies of an excerpt from the deposition of Tara Gaertner taken on January 2 and 3, 2014.

FURTHER YOUR AFFIANT SAITH NAUGHT.

Dated this 4th day of December, 2014.

By  _____
JOHN M. HOWELL

SUBSCRIBED AND SWORN to before me this 4th day of December, 2014.

 _____
Notary Public for Idaho
Residing at Nampa, Id
Commission expires: 10/09/2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of December, 2014, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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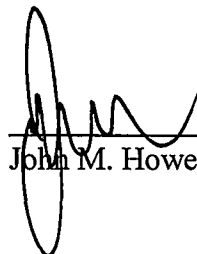
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John M. Howell

From: VJK <aire1@pacbell.net>
Sent: Wednesday, August 03, 2011 9:58 PM
To: Bill Raff; Sheila Thomason; Tony Drost
Cc: Sagecrest; Lizz Loop; William and Beth Raff
Subject: RE: Water Heater Needs Replaced ASAP
Attachments: image009.jpg; image003.jpg; image004.jpg; image005.jpg; image006.png; image007.png; image008.png

Well, we were just trying to clarify since the POA is being asked to research this issue with mechanical engineers and such.

Jon,

What can the association do to get a professional (licensed mechanical engineer) in to solve this once and for all?



The fix is to replace the problem units with a new design water heater. We have asked Sheila to make sure that these new water heaters do not create the same issues and the information sent appears to indicate and express plumbing states that the new WH are better designed.

Sheila and us have discussed enlarging the air intake from the living room on C models and the exhaust is being enlarged with the new WH during install according to Sheila. The A and B models are another issue since they are located in the same room as the dryers. The solution at this point is to add a vent from the hall and build a partial wall to keep the lint from entering the WH area. This solution is waiting a reply from Sheila to see the feasibility of these solutions. Have not heard to date.

The long term fix is having approved WH in a location that is kept clean. In addition, Sheila and us discussed the need to install CO2 monitors in each unit. Still waiting to hear if this is going to be done.

Just trying to stay in the loop, since the letter went out without the POA seeing it first and was only made aware of the letter after receiving calls regarding a letter we had not seen. We do not know of any other options under discussion at this time.

Thanks.

 Virginia and Jon 

--- On Wed, 8/3/11, Tony Drost <Tony@FRPMRENTALS.COM> wrote:

From: Tony Drost <Tony@FRPMRENTALS.COM>
Subject: RE: Water Heater Needs Replaced ASAP
To: "VJK" <aire1@pacbell.net>, "Bill Raff" <wmraffdesigns@yahoo.com>, "Sheila Thomason" <Sheila@FRPMRENTALS.COM>
Cc: "Sagecrest" <sagecrest@FRPMRENTALS.COM>, "Lizz Loop" <Lizz@FRPMRENTALS.COM>, "William and Beth Raff" <raffbeth@yahoo.com>

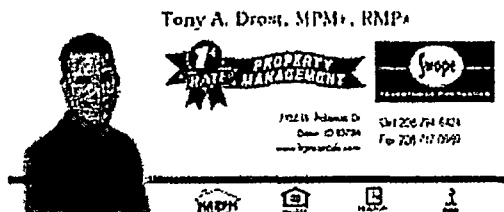
CONFIDENTIAL



0078500444

Date: Wednesday, August 3, 2011, 8:37 PM

Everyone understands that. As you have requested, FRPM is keeping the POA informed of any major issues happening within the complex. Also, their certainly will be savings for all if a common action/repair is made. IF we buy 100 water heaters at one time, we should be able to get them at a reduced price. If we do them one at a time, cost will be more. We're just trying to communicate the best we can.



Tony A. Drost

www.frpmrentals.com

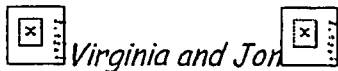
www.boiseinvestmentproperties.net



From: VJK [mailto:aire1@pacbell.net]
Sent: Wednesday, August 03, 2011 9:34 PM
To: Bill Raff; Sheila Thomason; Tony Drost
Cc: Sagecrest; Lizz Loop; William and Beth Raff
Subject: RE: Water Heater Needs Replaced ASAP

Just to clarify, the water heaters are interior items of each unit and is therefore an owners choice on how to handle this situation, not the POA. This makes the costs for inspections and evaluations an owner may request, owner responsibility.

This was discussed in depth with FRPM and Sheila.



--- On Wed, 8/3/11, Tony Drost <Tony@FRPMRENTALS.COM> wrote:

From: Tony Drost <Tony@FRPMRENTALS.COM>
Subject: RE: Water Heater Needs Replaced ASAP

CONFIDENTIAL

00078800445

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as
the natural parents of
PRIVATE FIRST CLASS McQUEN C.
FORBUSH, USMC (Deceased),
and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTIFAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an
Idaho non-profit corporation,
d/b/a SAGECREST MULTIFAMILY
PROPERTY OWNERS' ASSOCIATION,
et al.,

Defendants.

Case No. CV PI 1304325

DEPOSITION OF TARA GAERTNER

January 2 and 3, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

EXHIBIT

tabbles

B00787

1 for everybody? Is it the same?
 2 A. I'm not sure exactly how it works. I
 3 think we recommend to the owners that it -- the
 4 amount be 250, but if the owners want to increase
 5 it, they can. If they want to decrease it, they
 6 can.
 7 Q. And so for the purposes of a
 8 hypothetical, let's say that number is \$250 and you
 9 had to repair a dishwasher, would you communicate
 10 with an owner that you were going to go get bids to
 11 repair a dishwasher, or would that just be
 12 something that you would automatically do?
 13 A. I guess I'm confused by your question.
 14 Q. Okay. Let's say that there's a tenant
 15 that has a problem with a dishwasher --
 16 A. Okay.
 17 Q. -- and they come to you, correct?
 18 A. Yes.
 19 Q. This is pretty -- a typical situation, I
 20 guess.
 21 A. Uh-huh.
 22 Q. "Yes"?
 23 A. Yes. Sorry.
 24 Q. If a tenant comes to you with complaints
 25 about a dishwasher, would you then relay that

[Page 307]

1 information on to the owner?
 2 A. Typically, what we did is I would make a
 3 work order for the appropriate vendor to go out and
 4 see what's wrong with the dishwasher. If it was
 5 going to be costly, then that is something that I
 6 would discuss with the owner.
 7 Q. Would the owner get notice of the work
 8 order?
 9 A. Typically, we copied the owners on the
 10 work orders.
 11 Q. Okay. And how would the copy be made?
 12 Was it by e-mail?
 13 A. Yes.
 14 Q. And you say "typically."
 15 When would they get copied and when
 16 would they not?
 17 A. I don't -- I don't know.
 18 Q. Let's say that the repair -- the work
 19 order is sent out, the vendor gives you a bid to
 20 repair it, and it's under \$250.
 21 A. Uh-huh.
 22 Q. Would you have to get -- or would you
 23 get authority from the owner to make the repair?
 24 A. Typically not.
 25 Q. Okay. If it were over \$250, I assume

[Page 308]

1 you would have to get their authority, correct?
 2 A. Correct.
 3 Q. How about a replacement or a brand-new
 4 item, same -- same \$250 level in the hypothetical.
 5 If you had to replace the appliance and
 6 it's under \$250, would you have to get authority
 7 from the owner to do that?
 8 A. Yes.
 9 Q. Okay. Why?
 10 A. Because it's their money that we're --
 11 Q. I'm sorry. If I misspoke --
 12 We're assuming it's under \$250. Would
 13 you get authority?
 14 A. If the appliance that needed replaced
 15 was under \$250?
 16 Q. Right.
 17 A. No.
 18 Q. Okay. So whether it's a repair or
 19 replacement, it wouldn't matter to you? That
 20 doesn't change the rule, so to speak?
 21 A. Correct.
 22 Q. Okay.
 23 A. May I take a break to go to the
 24 bathroom?
 25 MR. HOWELL: Sure.

[Page 309]

1 (Break taken from 11:10 a.m. to 11:21 a.m.)
 2 Q. (BY MR. HOWELL) We're back on the record
 3 here.
 4 Getting back to my dishwasher example.
 5 A. Okay.
 6 Q. Have you ever had a situation where you
 7 recommended something like a dishwasher, an
 8 appliance, to be repaired or replaced to an owner,
 9 the cost of it is over the \$250 limit in our
 10 hypothetical, and the owner said, "No, I'm not
 11 going to do that"?
 12 A. Regarding a dishwasher specifically?
 13 Q. We'll start with my dishwasher example.
 14 If you recall.
 15 A. I don't remember.
 16 Q. Have you ever had a situation where
 17 you've made a recommendation that an owner do
 18 something, spend some money to get something
 19 repaired or replaced, and the owner does not follow
 20 your guideline or your recommendation?
 21 A. Yeah.
 22 Q. Such as?
 23 A. I believe there was a microwave that was
 24 going out, and those particular microwaves in an
 25 apartment are quite expensive because they go above

[Page 310]

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Belle
1-13-15
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NO. _____
A.M. _____ FILED P.M. 227

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JAN 12 2015

CHRISTOPHER D. RICH, Clerk
By STEPHANIE VIDAK
DEPUTY

Attorneys for Defendants Jon Kalsbeek,
Jay Arla, Christopher Schwab and David Meisner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC., et al.,

Defendants.

Case No. CV PI 1304325

**ANSWER TO PLAINTIFFS' FOURTH
AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL**

COME NOW the above-captioned Defendants Jon Kalsbeek, Jay Arla, Christopher Schwab
and David Meisner, by and through its counsel of record, John M. Howell, of the firm Barnum
Howell, and answer Plaintiffs' Fourth Amended Complaint as follows:

FIRST DEFENSE

Plaintiffs' Fourth Amended Complaint fails to state a claim against these answering Defendants upon which relief can be granted.

SECOND DEFENSE

I.

These Answering Defendants deny each and every allegation of the Fourth Amended Complaint not herein expressly and specifically admitted.

II.

With respect to the allegations of Paragraph 1 of Plaintiffs' Fourth Amended Complaint, these Defendants admit that McQuen Forbush passed away while at the Sagecrest Apartment Complex in Meridian, Idaho on November 10, 2012. These Defendants are without sufficient information or knowledge to admit or deny the remaining allegations contained in Paragraph 1.

III.

With respect to the allegations of Paragraphs 2 and 3 of Plaintiffs' Fourth Amended Complaint, these Defendants are without sufficient information or knowledge to admit or deny the allegations. These Defendants admit the allegations contained in Paragraph 4 of Plaintiffs' Fourth Amended Complaint. As to Paragraphs 5, 6, 7 and 8 of Plaintiffs' Fourth Amended Complaint, these Defendants admit only that the individual Defendants acted in their respective capacities as an officer of the Sagecrest POA. As to Paragraph 7, these Defendants admit that Mr. Schwab resides in Cupertino, California and as to Paragraph 8, these Defendants admit that Mr. Meisner resides in Meridian, Idaho. With respect to Paragraph 9 of Plaintiffs' Fourth Amended Complaint, these Defendants admit that Sagecrest POA had a contract with First Rate Property Management, Inc. to provide property management services as set forth in the parties' contract. With respect to the

Paragraphs 10, 11, 12, 13 and 19, these Defendants are without sufficient information or knowledge to admit or deny the allegations contained therein.

IV.

With respect to Paragraphs 22, 23 and 24, these Defendants admit that venue is proper in Ada County, Idaho. These Defendants are without sufficient information or knowledge to admit or deny the remainder of the allegations contained in Paragraphs 22, 23 and 24.

V.

These Defendants are without sufficient information or knowledge to admit or deny the allegations of Paragraphs 25 of Plaintiffs' Fourth Amended Complaint. These Defendants admit the allegations contained in Paragraph 26 of Plaintiffs' Fourth Amended Complaint. As to Paragraph 27 of Plaintiffs' Fourth Amended Complaint, the Ada County Coroner's report speaks for itself. With respect to Paragraph 28 of Plaintiffs' Fourth Amended Complaint, these Defendants admit that Sagecrest Apartment complex includes 28 separate buildings, each with four apartments, but are without sufficient information or knowledge to admit or deny the remaining allegations contained therein, and therefore deny the same. These Defendants are without sufficient information or knowledge to admit or deny the allegations contained in Paragraphs 29 and 30 of Plaintiffs' Fourth Amended Complaint. As to Paragraph 31 of Plaintiffs' Fourth Amended Complaint, these Defendants admit that the Sagecrest POA contracted with First Rate, which contract speaks for itself; these Defendants are without sufficient information or knowledge to admit or deny the remaining allegations contained therein. With respect to Paragraph 32 of Plaintiffs' Fourth Amended Complaint, the document attached as Exhibit 1 speaks for itself. These Defendants are without sufficient information or knowledge to admit or deny the remaining allegations of Paragraph 32. With respect to Paragraph 33 of Plaintiffs' Fourth Amended Complaint, these Defendants deny that

their actions were inappropriate. These Defendants are without sufficient information or knowledge to admit or deny the remainder of the allegations contained therein. With respect to Paragraphs 34-41 of Plaintiffs' Fourth Amended Complaint, these Defendants are without sufficient information or knowledge to admit or deny the allegations contained therein. With respect to Paragraph 42 of Plaintiffs' Fourth Amended Complaint, the document attached as Exhibit 2 speaks for itself, the remainder of the allegations contained therein are denied. These Defendants are without sufficient information or knowledge to admit or deny the allegations contained in Paragraphs 43, 45-48, 50-52, and 54-57 of Plaintiffs' Fourth Amended Complaint. These Defendants admit the allegations contained in Paragraph 44 of Plaintiffs' Fourth Amended Complaint. With respect to Paragraph 49 of Plaintiffs' Fourth Amended Complaint, these Defendants admit that Engineering Consultants Incorporated ("ECI") was hired and that ECI issued a report, which report speaks for itself. Paragraph 53 of Plaintiffs' Fourth Amended Complaint is denied. With respect to Paragraphs 58, 65, 72, 81, 89, 95, 104, 110, 116, 121, 126, these answering Defendants reallege any and all admissions and denials and affirmative defenses set forth herein as if in full response to those paragraphs.

VI.

With respect to Paragraphs 59 - 64 of Plaintiffs' Fourth Amended Complaint, no Answer on behalf of these Defendants is required because the cause of action is directed toward another Defendant.

VII.

These Defendants deny the allegations contained in Paragraphs 66-71 of Plaintiffs' Fourth Amended Complaint.

VIII.

With respect to Paragraphs 73-80 of Plaintiffs' Fourth Amended Complaint, no Answer on behalf of these Defendants is required because the cause of action is directed toward another Defendant.

IX.

With respect to Paragraphs 82-88 of Plaintiffs' Fourth Amended Complaint, no Answer on behalf of these Defendants is required because the cause of action is directed toward another Defendant.

X.

With respect to Paragraphs 90-94 of Plaintiffs' Fourth Amended Complaint, no Answer on behalf of these Defendants is required because the cause of action is directed toward another Defendant.

XI.

With respect to Paragraphs 96-103 of Plaintiffs' Fourth Amended Complaint, no Answer on behalf of these Defendants is required because the cause of action is directed toward another Defendant.

XII.

With respect to Paragraphs 105-109 of Plaintiffs' Fourth Amended Complaint, no Answer on behalf of these Defendants is required because the cause of action is directed toward another Defendant.

XIII.

With respect to Paragraphs 111-115 of Plaintiffs' Fourth Amended Complaint as they pertain to these Defendants, the allegations contained therein are denied. With respect to the allegations contained therein directed at other Defendants, no Answer on behalf of these Defendants is required.

XIV.

With respect to Paragraphs 117-120 of Plaintiffs' Fourth Amended Complaint, no Answer on behalf of these Defendants is required because the cause of action is directed toward another Defendant.

XV.

With respect to Paragraphs 122-125 of Plaintiffs' Fourth Amended Complaint, no Answer on behalf of these Defendants is required because the cause of action is directed toward another Defendant.

XVI.

With respect to Paragraphs 127-132 of Plaintiffs' Fourth Amended Complaint as they pertain to these Defendants, the allegations contained therein are denied. With respect to the allegations contained therein directed at other Defendants, no Answer on behalf of these Defendants is required.

THIRD DEFENSE

Plaintiff Halowell and Plaintiffs' decedent were guilty of negligent and careless misconduct at the time of and in connection with the matters and damages alleged, which conduct on their part proximately caused and contributed to said events and resultant damages, if any. The negligence of such Plaintiffs is imputed to all Plaintiffs.

FOURTH DEFENSE

Plaintiffs are not the real parties in interest with respect to all or a part of their claim, contrary to Rule 17, Idaho Rules of Civil Procedure.

FIFTH DEFENSE

Plaintiffs are barred from recovery in whole or in part for failure to mitigate damages.

SIXTH DEFENSE

There exists no proximate causation and/or causation between any alleged act or alleged breach of duty or warranty by these answering Defendants and all or some Plaintiffs' alleged damages.

SEVENTH DEFENSE

To the extent that Plaintiffs have been compensated by collateral sources as provided for in I.C. § 6-1606, any award issued in this case should be reduced by the same.

EIGHTH DEFENSE

To the extent there was any prepayment of claims as provided for in I.C. § 41-1840, these answering Defendants are entitled to credit for the same.

NINTH DEFENSE

These answering Defendants allege the affirmative defense of comparative negligence as and against any and all other Defendants to this action or non-parties. The negligence, if any, of these answering Defendants is to be compared and reduced accordingly relative to any negligence committed by any other person, entity, or party.

TENTH DEFENSE

Plaintiffs' damages, if any, were proximately caused by the superseding, intervening negligence or conduct, whether tortious or otherwise, of other third persons; any negligence or

breach of duty on the part of these answering Defendants, if any, was not a proximate cause of the alleged loss to Plaintiffs. Such third persons would include, but are not necessarily limited to, other Defendants in this action. In asserting this defense, these answering Defendants do not admit any negligence, and to the contrary, deny all allegations of negligence or other blameworthy conduct.

ELEVENTH DEFENSE

There exists no proximate causation and/or causation between any alleged act or alleged breach of duty or warranty by these answering Defendants, and Plaintiffs' alleged damages, and all of Plaintiffs' alleged damages were the result of conduct of persons other than these answering Defendants.

TWELFTH DEFENSE

The negligence or acts of other Defendants to this action are not imputed to these answering Defendants.

THIRTEENTH DEFENSE

Plaintiffs claims are barred or limited by application of the Idaho Non-Profit Corporation Act.

FOURTEENTH DEFENSE

Plaintiffs' claims are barred by the application of the business judgment rule.

FIFTEENTH DEFENSE

Plaintiffs have waived, or by their conduct, are estopped from asserting the matters alleged in their Fourth Amended Complaint.

SIXTEENTH DEFENSE

Plaintiffs' claims are barred or limited by the application of Idaho Code §6-1605.

SEVENTEENTH DEFENSE

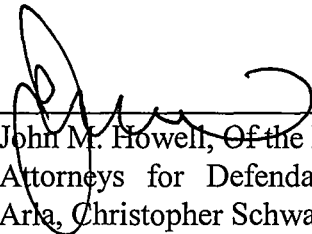
Discovery in this matter has not yet commenced; and in the event further defenses become available to this answering Defendant pursuant to such further discovery, this answering Defendant specifically reserves the right to amend this Answer to allege further admissions, denials and/or affirmative defenses.

WHEREFORE, these Defendants pray that Plaintiffs take nothing by their Complaint, that the Complaint herein be dismissed, and that these Defendants be awarded their costs of suit, reasonable attorney fees pursuant to Idaho Code §§ 12-120 and 12-121, and Idaho Rule of Civil Procedure 54, and such other and further relief as the Court deems just.

DEFENDANTS DEMAND A TRIAL BY JURY AS TO ALL ISSUES

DATED this 12th day of January, 2015.

BARNUM HOWELL, PLLC

By  _____
John M. Howell, Of the Firm
Attorneys for Defendants Jon Kalsbeek, Jay
Aria, Christopher Schwab and David Meisner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12TH day of January, 2015, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

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John M. Howell

JAN 15 2015

CHRISTOPHER D. RICH, CLERK
By BETH MASTERSON, DEPUTY

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, *et. al.*,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS ASSOCIATION,
INC., *et. al.*,

Defendants.

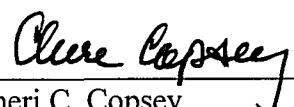
Case No. CV-PI-2013-04325

NOTICE OF INTENT TO RECONSIDER
COURT'S DECISION DENYING
SAGECREST'S SUMMARY JUDGMENT

The Court hereby gives notice of intent to reconsider its decision denying summary judgment to Sagecrest Multi Family Property Owners Association, Inc. ("Sagecrest POA"). Having re-read the record, in particular the deposition material and all the e-mails the Court questions whether Sagecrest POA had a duty of care, recognized by law, to Adra Kipper or her licensees to repair the water heater in her unit or to warn her of problems with her water heater. Therefore, the Court orders the parties to simultaneously respond to the Court's intent to reconsider by February 13, 2015, with a brief **not to exceed twenty-five (25) pages without order of the Court for good cause. The Court set a hearing for March 12, 2015, at 2:30 p.m.** The copies of *all* materials, including any attachments or affidavits, shall be sent by email in a Word document to dcdansel@adaweb.net.

IT IS SO ORDERED.

Dated this 14th day of January 2015.


Cheri C. Copsey
District Judge

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

<p>TRAVIS FORBUSH and GRETCHEN HYMAS, individually and as the natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased), and BREANNA HALOWELL,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION et al.,</p> <p>Defendants.</p>	<p>Case No. CV PI 1304325</p> <p>PLAINTIFFS' SUPPLEMENTAL BRIEF RE: DEFENDANT SAGECREST POA'S MOTION FOR SUMMARY JUDGMENT</p>
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INTRODUCTION

While the Sagecrest POA may lack the power or authority to actually purchase or replace a water heater without an owner's consent,¹ the POA did have the power to act, and it did act – without owner involvement – by controlling almost every aspect of the multi-dimensional response to the carbon monoxide (CO) problem in the unit interiors at Sagecrest. The POA's conduct affirmatively established its duties to Plaintiffs here.

The POA did more than just coordinate between unit owners like Switzer, and its property management agent, First Rate, to determine a global plan for how to respond to the CO issue at Sagecrest during 2011 and 2012. The POA ordered First Rate to take actions that completely cut owners like Switzer out of the loop, as the POA took charge of the response to the CO problem. In doing so, the POA exercised control over exactly what was, and wasn't, done to keep tenants and their guests safe inside the Sagecrest apartment units, thereby establishing a tort duty to Plaintiffs. Such a course of conduct may be highly unusual for an owners' association – which *typically* neither has nor exercises control over how a property was managed within the interior walls of an apartment – but these are the facts of this case.² And under the facts of this case, the POA breaching its duties under (1) premises liability; (2) voluntarily assumed duty and increased / created danger; and (3) vicarious liability theories.³

¹ Evidence in the record shows that the POA had and exercised emergency authority to address “global” safety issues at Sagecrest, but that the POA deferred to unit owners with respect to the ultimate decision of whether to actually purchase and replace a water heater (due to cost). See, “CO Procedures Rev. 3-20-12,” at G, P's Br. Ex. 13. Thus, the POA did not owe a premises liability-based duty to Plaintiffs to replace the water heater in unit 4624.

² The POA and its President Kalsbeek's interjection into the CO response gives rise to the POA's liability; if the POA had done nothing, the property manager and the individual owners would have shouldered the burden to act. But because the POA interceded and directed the CO response, the POA established *control*, and with that, a tort duty.

³ This is not a contract case. Plaintiffs' claims do not arise via breach of contract, or of any of the POA's Articles, CCR's, etc. The CCR's and other documents raised in the POA's

FACTS

SCOPE OF POA/FIRST RATE'S POWER AND CONTROL AT SAGECREST

1. The POA's control and involvement in the management and operation of the unit interiors at Sagecrest was pervasive, unlike the usual owner/property manager/property owners' association arrangement. Here, the POA actively sought out and commanded control over the response to the CO danger inside the unit interiors at Sagecrest.⁴
2. The POA controlled the Sagecrest unit interiors both directly and through its agent, First Rate. "FRPM is the association manager and take [*sic*] direction from the board of directors in regard to SC." (Drost Aff., ¶¶ 37-38, att. to FR MSJ; POA-First Rate contract, § 7.0, D's Br. Ex. 3).
3. The POA directed First Rate's management of Sagecrest regarding complex-wide "global issues," including CO-related safety issues inside unit interiors. The Kalsbeek / POA "CO Procedures" and First Rate's CO response during 2011-2012 were authorized and implemented at Kalsbeek and the POA's direction. **"Jon [Kalsbeek] was in control, and we did what he told us to do."** (Drost Dep., at 93:14-95:19, P's Br. Ex. 6).

summary judgment brief do not control the existence of the POA's tort duty to Plaintiffs, although they are evidence of the parties' relative roles in this complicated and unusual property management scheme. See *In re Otero Cnty. Hosp. Ass'n, Inc.*, 514 B.R. 315, 326-27 (Bankr. D.N.M. 2014) (Actual control and active participation – not the respective contracts – defined the defendant's tort duty.) Contract terms do not define a tort duty to an injured third party. *Baccus v. Ameripride Services, Inc.*, 145 Idaho 346, 350, 179 P.3d 309, 313 (2008)(Negligent conduct and breach of contract are two distinct theories of recovery.)

⁴ The POA's authority to control the unit interiors is set forth in the Articles of Incorporation and the CCR's, and the POA-First Rate contract, as detailed in Plaintiffs' and First Rate's responses to the POA's MSJ (P's Br., and FR Br., incorporated herein by reference) and further addressed at the October 30, 2014 Hearing on the POA's MSJ. Section 3.4 of the POA-First Rate contract, in particular, required First Rate to address "any emergency" — without regard for whether that emergency arises in a unit interior, unit exterior, or common area.

4. While the POA and First Rate lacked authority to replace water heaters due to the cost, they did not need – nor did they seek - owner permission for any charges pertaining to their unit for maintenance or emergency response up to \$250 or \$300, such as CO monitoring, CO detector installations, and water heater maintenance, among other things. (POA-First Rate Agrmt, § 3.4, D's Br. Ex. 3; POA-Switzer Agrmt, § 9.5, D's Br. Ex. 4).
5. The POA rejected (without consulting unit owners) First Rate's suggestion to hire a professional plumber or HVAC company to maintain and/or repair the water heaters to prevent the potential production of CO in the apartment interiors. When First Rate asked the POA in April 2011 to have a professional plumber clean the water heaters, Kalsbeek objected. (P's Br. Ex. 11). First Rate employee Tara Gaertner forwarded the cost of professionally cleaning the water heaters to Kalsbeek (P's Br. Ex. 12), but the POA never authorized First Rate to hire qualified professionals to perform preventative cleaning.
6. The POA instituted a set of its desired protocols and procedures for how First Rate was to respond to the CO danger at Sagecrest – the protocol was revised, in writing, on March 20, 2012. (CO Procedures Rev. 3-20-12, P's Br. Ex. 13).
7. The POA instituted CO testing / monitoring procedures for its agent, First Rate, to test for CO in the apartments without owner approval and directly contrary to First Rate's suggested methods. See P's Br., at 8-10. For example, Mr. Kalsbeek controlled First Rate by directing Ms. Gaertner to follow his procedures, rather than the gas company's procedures. (Gaertner Dep. 95:3-10, P's Br. Ex. 14).
8. In a May 20, 2012 email to First Rate, Mr. Kalsbeek established that he instituted the CO testing procedures, and that he personally traveled to Boise enforce them:

[W]e traveled 1600 miles (800 each way) to correct the CO monitoring procedure that was being done incorrectly. Over the previous 6 months, how

many water heater changes and unnecessary expense to owners was caused by water heaters being changed due to inaccurate readings, — will we ever know?”

(Kalsbeek Email, P’s Br. Ex. 19)(emphasis added).

9. In the past, the POA had left the installation of CO detectors up to individual unit owners (see, e.g., Gaertner 11-9-11 Email to unit owners recommending replacing smoke detectors with a \$62.48 combination CO/smoke detector, P’s Br. in Resp. to Switzer MSJ, Ex. 11). But in 2012 – prior to the incident – the POA took command and implemented a policy of directing the installation of CO detectors without prior unit owner approval. Under the POA’s new policy, the CO detectors were to be installed over time, sporadically, such as during lease renewals, or when a smoke detector was found to be faulty. (CO Procedures Rev. 3-20-12, P’s Br. Ex. 13)
10. The POA’s procedures for the installation of CO detectors were “Jon’s way” — i.e. “the way Jon wanted to have the testing and the maintenance done.” (Thomason Dep. 52:24-53:16, P’s Br. Ex. 8). Ms. Gaertner recalled that Mr. Kalsbeek “came into town when we had that meeting and said, ‘This is what the procedures are going to be.’ He laid them out for us.” (Gaertner Dep. 302:9-11, P’s Br. Ex. 14).
11. After implementing Mr. Kalsbeek’s revised CO procedures in 2012, the POA rejected First Rate’s suggestion that a contractor go door-to-door to make sure that each unit had a functioning detector. On October 11, 2012, Ms. Gaertner emailed Mr. Kalsbeek – *agent pleading to principal* – “After yesterdays [sic] events I would like to have Chris [handyman contractor] go into every unit and check and make sure the CO detectors that we installed are in working condition. The units that do not have CO detectors I would like him to install one. . . I would really like to do this to take the heat off us.” (P’s Br. Ex. 20). Mr. Kalsbeek

exerted the POA's control over the situation, responding: "*I will talk to the board and see how the board wants to proceed.*" *Id.*

12. The POA never followed up to Ms. Gaertner's email or gave First Rate the "ok" it sought to send a contractor door-to-door to make sure each apartment had a working CO detector. (Ex. 1 to the Dec. of M. Lutz 3-2-15, Kalsbeek Dep., at 149:18 – 150:12)
13. Instead, the POA ordered its agent, First Rate, to continue to selectively install the detectors over time, without any urgency. (See CO Procedures Rev. 10-25-12, Ex. 2 to the Dec. of M. Lutz 3-2-15)
14. Mr. Kalsbeek told First Rate employees "*There is absolutely nothing about owners' approval*" with regard to hard-wired detector installation, and reaffirmed his protocol that CO detectors would not be installed immediately in all units, but, rather, over time. (10-25-12 Meeting Transcript, at 14:15-18, P's Br. Ex. 9).
15. Mr. Drost and Mr. Kalsbeek agreed not to take any special steps in late October 2012 to ensure that CO detectors were hard-wired in each unit. (*Id.*, at 14:25-17:16, P's Br. Ex. 9).
16. First Rate did not install hardwired CO detectors immediately in October 2012 because it was *following the POA's ordered CO procedures:*

Q. What reasons were there, if any, that the hardwired detectors were not installed immediately after the October 11 e-mail?

Q. (BY MR. LOGAN) I understand there were meetings, but were there specific reasons for not doing the -- having the hardwired detectors installed immediately?

A. We were having them installed during preventative maintenance.

Q. And --

A. Preventative maintenance was going on during this time.

Q. And that was just good enough for First Rate?

THE WITNESS: *It -- it's how we were following the procedures.*

(L. Loop Dep., at 395:4-397:5, Ex. 3 to the Dec. of M. Lutz 3-2-15),(objections omitted).

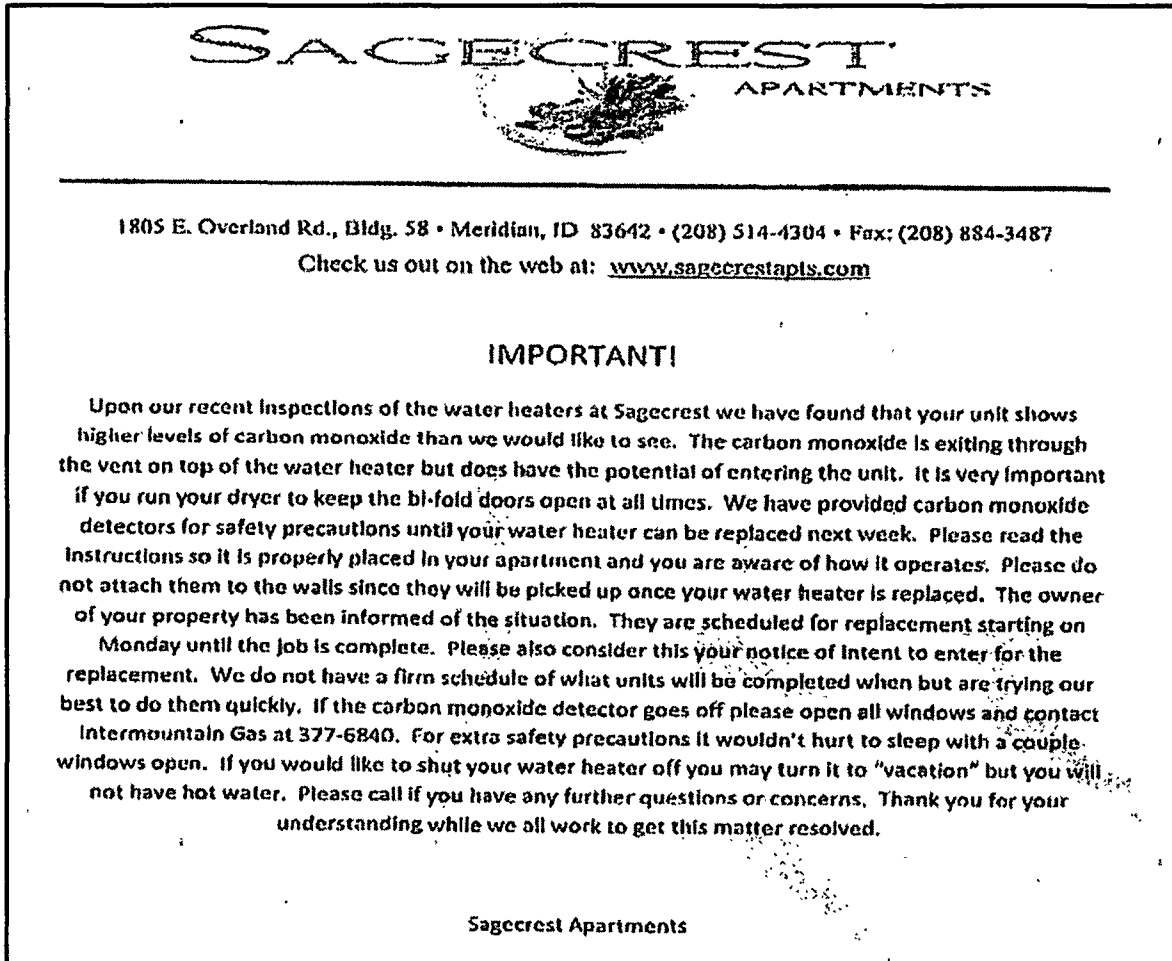
17. Because it was following Mr. Kalsbeek's procedures, First Rate did not install a hardwired CO detector in unit 4624 prior to November 10, 2012. That night/early morning, the Fire Department's warning (from a month before) was realized:

[t]hey said that the detectors that we gave the tenants when this first happened is not enough to cover our end. He said the tenants may not have even put the batteries in and installed them properly. He said if they didn't then it would not be the tenants [*sic*] fault it would be our responsibility to make sure they are installed and working property [*sic*]. He recommended installing CO detectors that we have been installing in every unit.

(P's Br. Ex. 20). The POA was warned. Its agent asked to remedy the situation. But the POA prevented the remedy by insisting that its agent follow the POA's policy of installing hard-wired CO detectors only sporadically, over time. The POA is liable for the result.

VOLUNTARILY ASSUMED DUTY / INCREASED DANGER

18. In March 2012, the POA – through its agent First Rate – notified tenant Adra Kipper:



(IMPORTANT! CO Warning – Ex. 4 to the Dec. of M. Lutz 3-2-15,)

19. The warning was written on POA letterhead, just as the POA's Board of Directors had used in the past, and have used since that time. (See, e.g., POA ltr., signed by Kalsbeek, on "Sagecrest Apartments" letterhead, Ex. 5 to the Dec. of M. Lutz 3-2-15; and POA Board Meeting Minutes, Ex. 6 to the Dec. of M. Lutz 3-2-15).

20. The POA's written promise – *via its agent* – to replace the water heater, induced reliance by tenant Adra Kipper. She relied on the letter and believed that the water heater was replaced

and that she (or her guests) was no longer in danger of a possible CO exposure. (A. Kipper Dep., 34:6-11, att. to P's Resp. to Switzer MSJ).

21. The POA actively prevented information and warnings from being shared with unit owners and tenants about the CO danger. If Switzer or Kipper had known about the extent of the CO danger or the POA's chosen means of responding, they would have had an opportunity to protect themselves and others by addressing the danger, or moving out. See, e.g., Gaertner Dep. 241:22-242:11, P's Br. Ex. 14; Thomason Dep. 140:16-141:11, P's Br. Ex. 8; *id.* at 193:25-195:14 (Kalsbeek was the only barrier preventing Ms. Thomason from distributing Mr. Davis' letter to all owners.)
22. In October 2012, after tenant Molly Collins was poisoned, Kalsbeek expressed anger at Drost because his employee had advised the tenant to seek testing by professionals:

He was upset that she [Ms. Gaertner] would instruct a tenant to call the fire department or Intermountain Gas. He said that she was continually not following his procedures as revised, that she should have gone over there and tested it, and that it created a liability for myself and the POA by calling the authorities or public entity or something like that.

(Drost Dep. 257:9-16, P's Br. Ex. 6).

STANDARD OF REVIEW

The existence of a duty becomes a question of fact when it depends on the resolution of a factual dispute. See *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 402, 987 P.2d 300, 314 (1999) (questions of fact regarding whether a defendant assumed a duty through a voluntary undertaking precluded grant of summary judgment); *Herrera v. Estay*, 146 Idaho 674, 679-80, 201 P.3d 647, 652-53 (2009) (remanding to district court to specify the reasons underlying its grant of summary judgment in light of factual dispute over whether there was sufficient control to give rise to a duty). In considering a summary judgment motion, "the Court should liberally

construe the facts in favor of the party opposing the motion, together with all reasonable inferences from the evidence.” *Coghlán*, 133 Idaho at 401, 987 P.2d at 313.

ARGUMENT

The POA’s duty to the victims in this case arises under three distinct legal theories. **First**, POA’s duty arises from POA’s control of the Sagecrest apartments under a premises liability theory. While the POA did not have authority or control over whether to purchase or replace a water heater in Switzer’s unit, the POA had authority to and did actually control virtually every other aspect of the CO response at Sagecrest, including inside unit interiors of the apartments.

Second, the POA separately owed a duty to Plaintiffs to actually replace the water heater in 4624 because the POA voluntarily assumed such a duty. The POA assumed a duty based on its voluntary undertaking to replace the water heater in unit 4624, notifying tenant Adra Kipper that her water heater would be replaced, and inducing her reliance that the POA would make her apartment safe. Separately, under Restatement of Torts §§ 323 & 324A, the POA is subject to liability for the Plaintiffs’ injuries because the POA assumed duties, and its unreasonable acts and omissions actually increased the risk of harm.

Finally, even if POA did not owe an independent duty, it is vicariously liable for First Rate’s negligence. First Rate acted as the POA’s agent in responding to the CO issue inside unit interiors at Sagecrest. Because the scope of the agency included First Rate’s activities in unit interiors, the POA is vicariously liable for First Rate’s negligence.

1. PREMISES LIABILITY—THERE IS A GENUINE ISSUE OF MATERIAL FACT REGARDING THE POA’S CONTROL OVER UNIT INTERIORS.

“[T]he general rule of premises liability is that **one having control of the premises may be liable for failure to keep the premises in repair.**” *Jones v. Starnes*, 150 Idaho 257, 261,

245 P.3d 1009, 1013 (2011) (emphasis added). Even if a party does not own the premises, if it exercises control over the premise upon which an injury occurs, then a duty arises and the controlling party may be liable under a premises liability theory. *McDevitt v. Sportsman's Warehouse, Inc.*, 151 Idaho 280, 286, 255 P.3d 1166, 1172 (2011). As shown above, and when the facts are viewed in the light most favorable to Plaintiffs, a jury could find that the POA sufficiently controlled the premises. The POA retained the authority to repair, maintain, and restore unit interiors when it deemed the owner's activities to be unsatisfactory. **The POA had an easement – CCR's Section 3.6 and 3.7, among others – to go in and do exactly what they did. And that authority is consistent with the fact that the POA actually did act.**⁵

The POA acted authoritatively with respect to unit interiors, including the response to CO issues. As shown above, the POA owed a duty to the Plaintiffs and is liable under Idaho premises liability law because of its control over the premises, including:

- a. rejecting (without consulting unit owners) First Rate's suggestion to hire a professional plumber or HVAC company to maintain and/or repair the water heaters;
- b. instituting unreasonable CO testing / monitoring procedures;
- c. instituting an unreasonable protocol for the installation of CO detectors at Sagecrest, but rejecting First Rate's suggestion that a contractor go door-to-door to make sure that each unit had a functioning detector in October 2012; and
- d. actively preventing information and warnings from being shared with unit owners and tenants about the CO danger at the property.

⁵ To the extent there is any question as to whether the POA actually had the power to take the action it took in responding to the CO danger at Sagecrest: where a contract is ambiguous, the provisions should be read in the light most favorable to Plaintiffs, and the POA's motion should be denied where the contract provisions can be read to give the POA control over the unit interiors. See *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (noting in breach of contract case that summary judgment is inappropriate if the contract is ambiguous) and *id.* at 889 (the court may consider "whether, construing the evidence in the nonmovant's favor, the ambiguity can be resolved consistent with the nonmovant's position").

When the facts are viewed in the light most favorable to the Plaintiffs, as they must be, the POA's control of the premises during 2011-2012 gives rise to a duty in this case.

2. VOLUNTARILY ASSUMED DUTY —THERE IS A GENUINE ISSUE OF MATERIAL FACT REGARDING THE POA'S VOLUNTARILY ASSUMED DUTIES AT SAGECREST.

A. VOLUNTARILY ASSUMED DUTY + RELIANCE. THE POA VOLUNTARILY ASSUMED A DUTY TO REPLACE THE WATER HEATER IN SAGECREST 4624—AFFIRMATIVELY REPRESENTING TO TENANT ADRA KIPPER THAT THE WATER HEATER WOULD BE REPLACED, INDUCING HER RELIANCE THAT THE APARTMENT WOULD BE MADE SAFE.

A legal duty arises if one voluntarily undertakes to perform an act, having no prior duty to do so. *Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 688, 316 P.3d 92, 100 (2013). The underlying policy behind the imposition of a duty “arises from a person voluntarily assuming a position, and by filling that position another can reasonably rely on that person to act with reasonable care and provide protection from unreasonable risks of harm.” *Id.* (quotation omitted).

A premise liability duty and a duty arising from a voluntary undertaking are “alternative” theories. See *Coghlan*, 133 Idaho at 400, 987 P.2d at 312. In *Coghlan*, a drunk college student returned to her sorority house, fell off of the fire escape and was injured. The court determined that a material issue of fact existed as to whether the sorority voluntarily assumed a duty of reasonable care, in light of evidence that the sorority selected the student as a sorority pledge, invited her to attend parties with knowledge that alcohol would be served, and took the intoxicated student back to the sorority house and put her to bed on the third floor. 133 Idaho at 402, 987 P.2d at 314. The court did not discuss whether the student relied on the sorority, but given the policy underlying the imposition of a tort duty as set forth in *Beers*, such reliance is presumed when a party voluntarily undertakes a safety-related function.

Baccus v. Ameripride Services, Inc., 145 Idaho 346, 179 P.3d 309 (2008), supports the idea of reliance being presumed. In *Baccus*, a worker was injured when he slipped because AmeriPride failed to place a safety mat; Ameripride had been hired by the worker's employer to provide safety mats, and had done so on prior occasions. 145 Idaho at 351-352, 179 P.2d at 314-15. While the court identified no specific evidence that the worker actually relied on earlier placements of safety mats, or even knew of the existence of a company called AmeriPride, the court explained why imposing a duty was proper:

AmeriPride's alleged failure to place a mat at the entry may have increased the risk of harm because it resulted in a mat-less southern entry where a mat normally would have existed. **Had AmeriPride not agreed to place the mats at the entry, Bechtel likely would have found another company to fulfill that duty. Bechtel and its employees therefore were relying on AmeriPride to prevent the southern entry's conditions from becoming more hazardous than they would be without safety mats.** So, AmeriPride induced Bechtel's reliance on AmeriPride's promise to replace the safety mats, which increased the risk that a Bechtel employee such as plaintiff could slip, fall, and sustain injury were the promise not kept.

145 Idaho at 352, 179 P.3d at 315 (emphasis added). AmeriPride performed a safety task that would have been performed by another had AmeriPride not done so, so the court presumed that AmeriPride's undertaking induced reliance.

In the instant case, the POA expressly represented to Adra Kipper that it would replace the water heater, and she relied on the POA's undertaking. First Rate clearly acted as the POA's agent in representing to Kipper that the water heater would be replaced—the warning was provided on “Sagecrest Apartments” (POA) letterhead. And the written promise induced reliance: Kipper testified that she never would have stayed at Sagecrest except she was lead to believe the CO issue had been taken care of. The POA induced Kipper's reliance by voluntarily

assuming a duty to replace the water heater in 4624.⁶ The POA voluntarily assumed a duty to ensure Kipper's apartment was safe and the water heater was not producing deadly CO, and the POA is liable for its negligence in failing to fulfill its promise. The POA also voluntarily assumed a duty with respect to the other CO responses it controlled, such as instituting CO testing protocols, directing the schedule of installing CO detectors, refusing to authorize professional servicing of water heaters, etc., so even though Kipper may not have known which entity was undertaking such safety-related tasks, it can be presumed that a tenant relies on whatever entity is performing such duties to do so in a reasonable manner.

Gagnon v. Western Bldg. Maintenance, Inc., 155 Idaho 112, 306 P.3d 197 (2013), also supports the imposition of a duty here. In *Gagnon*, a bank employee slipped on ice in a parking lot and sued WBM, the company responsible for maintaining the bank's parking lot and sidewalks. WBM claimed it was not authorized or asked to place ice melt in the parking lot, and it did not do so during the winter season when the employee was injured. 155 Idaho at 114, 306 P.3d at 199. WBM had, however, applied ice melt to the sidewalks. *Id.* Because WMB had never spread ice melt on the parking lot, it never undertook a duty that induced reliance:

Here, it is undisputed that Western did not spread ice melt on the Hayden branch parking lot during the winter of 2007–2008 and therefore it is inconceivable that Gagnon could have relied upon it to do so.

155 Idaho at 115, 306 P.3d at 200. Here, however, the POA *did* undertake safety-related duties, which necessarily induced reliance. By voluntarily assuming these duties – and by inducing Kipper's reliance – the POA owed a duty to perform those tasks reasonably.

⁶ The *Baccus* court did not require specific evidence of reliance, and also did not require that the injured worker even know who or what undertook the duty to supply the mats. Ms. Kipper may not have known which corporate officer or employee had authorized the March 2012 warning to be provided to her, and she likely was unaware of what contractual roles Mr. Switzer, First Rate, and the POA played vis-à-vis each other, but she did read the obvious promise that her water heater would be replaced, and she relied on those persons to make the apartment safe.

B. VOLUNTARILY ASSUMED DUTY + INCREASE DANGER: RESTATEMENT OF TORTS §§ 323 & 324A. THE POA IS LIABLE FOR PLAINTIFFS' INJURIES BECAUSE IT VOLUNTARILY ASSUMED DUTIES AND AFFIRMATIVELY INCREASED THE DANGER.

Restatement (Second) of Torts § 323 states as follows:

[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm

Restatement (Second) of Torts § 323 (1965)(emphasis added). The Restatement (Second) of Torts § 324A is similar, but it extends the duty to use reasonable care in an undertaking to protect third parties other than those for whom the undertaker renders the service.⁷ It appears Idaho appellate courts have not expressly adopted § 324A.⁸ However, in *Fagundes v. State*, 116 Idaho 173, 176, 774 P.2d 343, 346 (Ct. App. 1989), the court applied § 323.⁹ Under either § 323 or § 324A, a party is liable for failing to reasonably perform a voluntary undertaking that it

⁷ Section 324A states as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:

(a) his failure to exercise reasonable care increases the risk of such harm

Restatement (Second) of Torts § 324A (1965)(emphasis added).

⁸ In *Bowling v. Jack B. Parson Companies*, 117 Idaho 1030, 793 P.2d 703 (1990), the court affirmed summary judgment on the grounds that intermittent safety inspections by a parent, corporation of its subsidiary's equipment and premises do not give rise to a duty under § 324A and stated that Idaho has not expressly adopted § 324A, despite the trial court observation that § 324A had been adopted by the Idaho Supreme Court.

⁹ Section 324A is similar to § 323, but it extends the duty to use reasonable care in an undertaking to protect third parties. Idaho would likely adopt § 324A since the absence of privity between parties does not defeat the existence of a tort duty under Idaho law.

knows will affect the safety of others if that failure of performance increased the risk of harm and injured another. Here, the POA did exactly that.

By implementing a false and dangerous response protocol, which prevented others from responding in a safer and more reasonable manner, the POA increased the likelihood that someone at the property would be poisoned by CO. The POA actively stymied the response efforts by others. For instance, First Rate suggested hiring a professional plumber to maintain/clean the filters in the water heaters (to decrease the risk that a water heater would clog and fail), yet the POA prevented this fix from being implemented. Later, First Rate sought to have a handy-man contractor go door-to-door to ensure that each and every apartment unit had a functioning CO detector to warn of a possible CO exposure; but the POA rejected this idea. Because the POA exerted absolute control over the property manager's operation and management at the property, First Rate did not even seek owner input on issues like this—the POA made the call. In doing so, the POA increased the risk that tenants or their guests would be poisoned. Consistent with §§ 323 and 324A, the POA owed Plaintiffs a duty because it voluntarily assumed duties and then increased the danger of a CO incident.

3. AGENCY--THE POA IS VICARIOUSLY LIABLE FOR ITS AGENT'S NEGLIGENCE

First Rate acted as the POA's agent in responding to the CO issue inside unit interiors at Sagecrest. **Because the scope of the agency included First Rate's activities in unit interiors, the POA is vicariously liable for First Rate's negligence.** See *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 303, 796 P.2d 506, 512 (1990) ("A principal is liable for the torts of an agent committed within the scope of the agency relationship."). The extent of an agent's authority is a question of fact normally reserved for the jury. *Clark v. Tarr*, 76 Idaho 383, 391, 283 P.2d 942, 947 (1955). Any one of the three types of agency – express, implied, or apparent – is sufficient

to bind the principal to a contract entered into by an agent with a third party. *Tri-Circle, Inc. v. Brugger Corp.*, 121 Idaho 950, 954, 829 P.2d 540, 544-545 (Ct. App. 1992).¹⁰ The POA-First Rate Contract directs First Rate to act on behalf of the POA. And in responding to the CO threat inside unit interiors, First Rate acted as the POA's agent. Because First Rate acted within the scope of its agency for the POA –express, implied, or apparent – in carrying out Kalsbeek and the POA's directives, the POA is liable for First Rate's negligence.

To the extent that the POA lacked any *formal* authority over unit interiors, First Rate *actually* served as the POA's agent with respect to unit interiors. The POA vigorously asserted its power to direct First Rate's performance with respect to all "global issues" affecting unit interiors, including water heater repair, testing, and maintenance; hard-wired CO detector installation; and the dissemination of information or warnings regarding CO poisoning at Sagecrest. The POA is vicariously liable for First Rate. This Court has already denied summary judgment on Plaintiffs' claims of negligence against First Rate; summary judgment is equally improper for First Rate's principal, the POA.

CONCLUSION

Under normal circumstances, an owner's association would probably have little control or involvement with safety issues inside the walls of an apartment within an apartment complex; such associations generally deal with common areas and exterior issues. But the POA did not function as a typical association; these are not normal circumstances; and this is not a normal

¹⁰ Express authority is where the principal explicitly granted the agent authority to act in the principal's name; implied authority is authority which is necessary, usual, and proper to accomplish or perform the express authority delegated to the agent by the principal; and apparent authority is where a principal "voluntarily places an agent in such a position that a person of ordinary prudence . . . is justified in believing that the agent is acting pursuant to existing authority." *Tri-Circle*, 121 Idaho at 954.

case. The POA had and exerted substantial and surprising control – directly, and through its agent First Rate – in responding to the CO danger at Sagecrest during 2011-2012.

The POA exercised control over water heater maintenance, CO testing, and the installation of hard-wired CO detectors — all unit interior issues. The POA represented to Adra Kipper and others that it would replace her dangerous water heater and make her apartment safe, inducing her reliance. The water heater did not get replaced as promised. Beyond its negligent acts in taking charge of the CO response at Sagecrest, the POA affirmatively increased the danger of a deadly CO poisoning by preventing others from implementing measures, or passing information, that could have kept Plaintiffs safe.

There is ample evidence from which a jury could conclude that the POA exercised control over unit interiors; that the POA failed to exercise reasonable care to prevent a foreseeable risk of death and serious injury; that the POA is responsible for the failure of First Rate, in its capacity as an agent of the POA, to exercise reasonable care; and that the POA actively contributed to the danger by voluntarily assuming safety duties in response to the CO issue at Sagecrest. This Court should deny the POA's Motion for Summary Judgment.

DATED this 2nd day of March, 2015.



TYSON E. LOGAN, logan@spencelawyers.com
THE SPENCE LAW FIRM, LLC
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2014, I caused a true and correct copy of the foregoing to be served via email, addressed to the following:

James D. LaRue jdl@elamburke.com Matthew Walters mlw@elamburke.com ELAM & BURKE, PA <i>For A.O. Smith</i>	Mark Tripp tripp.mark@bradshawlaw.com Jason C. Palmer palmer.jason@bradshawlaw.com BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C. <i>For A.O. Smith</i>
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Robert Anderson raanderson@ajhlaw.com Robert A. Mills rmills@ajhlaw.com ANDERSON, JULIAN & HULL LLP <i>For First Rate Property Management & Drost</i>	



THE SPENCE LAW FIRM, LLC

Judge COPSEY
MAR/02/2015/MON 03:00 PM
Beth
3/3/15
LH

FAX No.

P. 002

ERIC R. CLARK (ISB # 4697)
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NO. _____
FILED _____
AM. _____ PM. _____

MAR 02 2015

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By JAMIE MARTIN
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF
IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN HYMAS , individually and as the natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased), and BREANNA HALOWELL, Plaintiffs, vs. SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION <i>et al.</i> , Defendants.	Case No. CV PI 1304325 DECLARATION OF MICHAEL F. LUTZ TO ACCOMPANY PLAINTIFFS' SUPPLEMENTAL BRIEF RE: DEFENDANT SAGECREST POA'S MOTION FOR SUMMARY JUDGMENT
---	---

Michael F. Lutz declares and states as follows:

1. I am over 18 years of age and am competent to make this declaration.
2. I am an attorney of record for the Plaintiffs in the above-captioned case.

DECLARATION OF MICHAEL F. LUTZ TO ACCOMPANY PLAINTIFFS' SUPPLEMENTAL BRIEF RE:
DEFENDANT SAGECREST POA'S MOTION FOR SUMMARY JUDGMENT — 1

3. Attached hereto as Exhibit 1 is true and correct copy of an excerpt of the Deposition of Jon Kalsbeek.

4. Attached hereto as Exhibit 2 is true and correct copy of "Carbon Monoxide Testing Procedures, Revised Date October 25, 2012," produced in discovery, marked as deposition exhibit 151, and bates stamped as FR 5844.

5. Attached hereto as Exhibit 3 is true and correct copy of an excerpt of the Deposition of Lizz Loop.

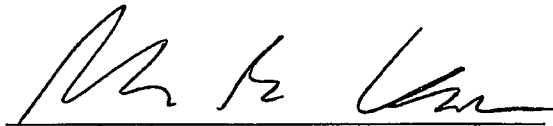
6. Attached hereto as Exhibit 4 is true and correct copy of "CO Warning Notice," produced in discovery, marked as deposition exhibit 14, and bates stamped as MPD 0303.

7. Attached hereto as Exhibit 5 is true and correct copy of a letter on POA letterhead, produced in discovery, marked as deposition exhibit 126, and bates stamped as FR 0316-0317.

8. Attached hereto as Exhibit 6 is true and correct copy of a meeting minutes on POA letterhead, produced in discovery, marked as deposition exhibit 149, and bates stamped as SPOA 1839.

I declare under penalty of perjury under the laws of the State of Idaho and the laws of the United States, that the foregoing is true and correct.

DATED this 2nd day of March, 2015.



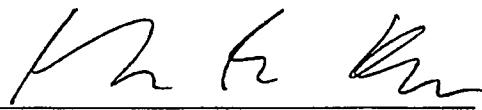
Michael F. Lutz

THE SPENCE LAW FIRM, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March 2015, I caused a true and correct copy of the foregoing to be served via email, addressed to the following:

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Michael F. Lutz

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as
the natural parents of
PRIVATE FIRST CLASS MCQUEN C.
FORBUSH, USMC (Deceased),
and BREANNA HALOWELL,

Plaintiffs,

vs.

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an
Idaho non-profit corporation,
d/b/a SAGECREST MULTIFAMILY
PROPERTY OWNERS' ASSOCIATION,
et al.,

Defendants.

DEPOSITION OF JON KALSBECK

April 3 and 4, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

1 (Record read by reporter.)

2 THE WITNESS: That's what I believe it's
3 saying.

4 Q. (BY MR. CLARK) Well, she says, "The
5 units that do not have CO detectors, I would like
6 him to install one."

7 Do you believe she was asking for your
8 permission to make that happen?

9 A. The way I understood this e-mail, she
10 was asking the association to pick up the fee for
11 testing and installing CO detectors.

12 Q. But why would she be asking you about
13 the fee if that was an owner's responsibility?

14 A. I --

15 MR. HOWELL: Objection; form.

16 Go ahead.

17 THE WITNESS: I have no idea.

18 Q. (BY MR. CLARK) Okay. Well, look at the
19 e-mail below; your response on October 11th, 2012.

20 A. Yes.

21 Q. It says, "We will discuss this further.
22 I will talk to the board and see how the board
23 wants to proceed."

24 Is that what you said?

25 A. That's what I said.

[149]

1 Q. And it's in response to this particular
2 e-mail above?

3 A. Yes.

4 Q. Okay. Did you discuss this issue of
5 having a charge -- or the issue is addressed in
6 Tara's e-mail with the board?

7 A. I don't recall.

8 Q. Did you determine how the board wanted
9 to proceed with regard to Chris inspecting or
10 making sure that the carbon monoxide detectors were
11 installed and working?

12 A. I don't recall any decision being made.

13 Q. Can you tell me why?

14 A. Because --

15 MR. HOWELL: Why he doesn't recall?

16 MR. CLARK: Why there was no decision made.

17 MR. HOWELL: Objection. That's not what he
18 said.

19 MR. CLARK: Let me --

20 Would you read back his answer for me.

21 (Record read by reporter.)

22 Q. (BY MR. CLARK) And my question was: Do
23 you recall why no decision was being made -- no
24 decision was made?

25 MR. HOWELL: Objection; form.

[150]

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)


I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:


That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 15th day of April 2014.


ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.



My Commission Expires: 2-14-17

2

CARBON MONOXIDE PROCEDURES

Revised Date: October 25, 2012

Throughout this process, continued diligence is necessary to protect tenants' safety and complex from possible hazardous conditions. Our goal is to have a safe and comfortable environment.

Every time a detector is activated inside a unit – the tenants unit shall be tested and the results shall be entered on the daily log.

These procedures shall be followed for detecting CO (carbon monoxide) levels in units:

Air filters shall be changed monthly; by 10-12 buildings at a time, starting April 2012

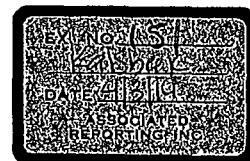
- A. During filter changes; the carbon monoxide detector testing unit shall be turned on prior to entering each unit, warmed up, and set to zero. Once in the unit, the tester shall be set on the kitchen counter sampling the air in the hall and living room.
- B. During the time of testing, the filter shall be changed, the area around the water heater inspected and cleaned-if necessary.
- C. Once the filter and water heater areas are completed, the tester shall be read. If the reading is below 30ppm, no further action is required.

Action required if:

- D. If the tester reading is 30ppm or above in the room- a proper test shall be conducted in the flue of the water heater. Be sure to turn on all hot water in the apartment so water heater can turn on and reach operating temperature, reset the tester to zero and make sure the water heater runs approximately 5 minutes prior to testing the air in the flue.
- E. If the air in the flue tests results in a reading between 100 and 300ppm, a note to call the owner shall be made to discuss replacement of the water heater. At the time of calling the owner, a follow up email for documentation shall be sent to the owner. At this time, a UL approved carbon monoxide/smoke detector combo shall be installed in the area of the hallway; unless one is already present. Should the owner elect not to change the water heater at this time, a second test shall be conducted on the water heater flue at operating temperature in 25 to 30 calendar days. Continue to do so every 25 to 30 calendar days until a safe condition exists-below 100ppm in the flue. Educate tenants. Should the water heater proper flue testing result in a higher reading than 300ppm at any time during this period, proceed to next step, G.
- F. If air in the flue tests 300ppm or above, note the reading, then, contact owner and inform immediate water heater replacement is required, followed up with an email for documentation. If owner refuses water heater replacement, advise owner Intermountain Gas is to be contacted so they can conduct a test of the unit. Should the results from this test be out of limits according to Intermountain Gas, a mandatory shutdown of the water heater will be done by the gas company. Should the owner not respond by phone or email within 24 hours of email notification, then, contact Intermountain Gas to conduct further testing. Educate tenants. At this point, a CO monitor shall be in place and operational, if one is not in place, install a CO/smoke monitor combo-UL approved in the hallway area.

To Be Completed Continuously

Carbon monoxide/smoke detector combos are to be installed in every unit by replacing the existing smoke detector currently in the hallway area with a Hardwired-Battery Back-up Combo Detector. CO monitors shall be changed out or replace existing smoke detectors in the hallway area during -- turnovers, preventative maintenance, lease renewals, or faulty smoke detector - until all units have combo detectors. (Should a smoke detector fail in a bedroom, the existing unit in hallway area shall be moved to the bedroom, if operational, and a new carbon monoxide/smoke detector shall be installed in hallway area.)



CONFIDENTIAL

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3

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN)
HYMAS, individually and as)
the natural parents of)
PRIVATE FIRST CLASS McQUEN C.)
FORBUSH, USMC (Deceased),)
and BREANNA HALOWELL,)

Plaintiffs,)

vs.)

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY)
OWNERS' ASSOCIATION, INC., an)
Idaho non-profit corporation,)
d/b/a SAGECREST MULTIFAMILY)
PROPERTY OWNERS' ASSOCIATION,)
et al.,)

Defendants.)

CONTINUED DEPOSITION OF LIZZ LOOP
PAGES 176-430

July 8, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

[Page 1]

1 A. No.
 2 Q. Can't be thrown away?
 3 A. Okay.
 4 Q. Taken by a former tenant, true?
 5 A. True.
 6 Q. I mean, there are reasons that you're
 7 aware of that it's recommended -- and you've heard
 8 this, I think -- that hardwired detectors are
 9 preferable to battery-operated detectors,
 10 correct --
 11 A. Correct.
 12 Q. -- at least as you sit here today?
 13 MR. ANDERSON: Hold on. "You've heard
 14 this"? Your question assumes something that I
 15 haven't seen a record of. What are you referring
 16 to?
 17 MR. LOGAN: I think she's answered, Counsel.
 18 Q. (BY MR. LOGAN) I'm going to refer you
 19 to Exhibit 123.
 20 Specifically, I want to ask you about
 21 that first e-mail on the first page of Exhibit 123,
 22 which was an e-mail sent from Tara to Mr. Kalsbeek,
 23 and then it looks like you and Mr. Drost were cc'd
 24 on that e-mail.
 25 Is that right?
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[Page 218]

1 A. Yes.
 2 Q. Do you remember --
 3 You recognize this e-mail, don't you?
 4 A. Yes.
 5 Q. Okay. And in there, Tara describes that
 6 she had talked to the fire department.
 7 Do you see that?
 8 A. Yes.
 9 Q. And this e-mail is on October 11th,
 10 2012. She says yesterday that she had talked to
 11 the fire department, so that would have been
 12 October 10th, 2012, and that they said that, "The
 13 detectors that we gave the tenants when this first
 14 happened is not enough to cover our end. He said
 15 the tenants may not have even put the batteries in
 16 and installed them properly. He said if they
 17 didn't, then it would be -- not be the tenants'
 18 fault. It would be our responsibility to make sure
 19 they are installed and working properly.
 20 "He recommended installing the CO
 21 detectors that we have been installing in every
 22 unit. I would really like to do this and take the
 23 heat off of us."
 24 Do you remember that, getting that
 25 e-mail from Tara?
 394

[Page 219]

1 A. Yes.
 2 Q. And that is about a month before the
 3 November 10th, 2012, poisoning.
 4 What I want to know is: What steps did
 5 First Rate take to get the hardwired detectors
 6 installed after October 11th, 2012, that you're
 7 aware of?
 8 MR. ANDERSON: After asking if they could do
 9 it?
 10 Q. (BY MR. LOGAN) Yeah, after this e-mail.
 11 And I recognize that this is an e-mail to
 12 Mr. Kalsbeek, right?
 13 A. Yes.
 14 Q. And you and Mr. Drost were cc'd.
 15 Do you know if there was ever a response
 16 from Mr. Kalsbeek?
 17 A. Yeah. He stated he was going to discuss
 18 it with the board.
 19 Q. And was there a further response that
 20 you're aware of?
 21 A. The only thing I recall is the meeting
 22 that was held the end of October.
 23 Q. The annual meeting and the meeting
 24 before that?
 25 A. It wasn't the annual meeting. It was a
 395

[Page 220]

1 meeting with, I believe, Jon, Tara --
 2 I don't remember who all was there.
 3 And it was discussed that the way we
 4 were doing it, because we were doing preventative
 5 maintenance, that was sufficient and it was an
 6 appropriate action that we were taking and we were
 7 going to continue it that way. That was agreed by
 8 everybody.
 9 Q. What reasons were there, if any, that
 10 the hardwired detectors were not installed
 11 immediately after the October 11 e-mail?
 12 MR. HOWELL: Objection; form.
 13 MR. ANDERSON: Asked and answered. She
 14 just --
 15 Q. (BY MR. LOGAN) I understand there were
 16 meetings, but were there specific reasons for not
 17 doing the -- having the hardwired detectors
 18 installed immediately?
 19 A. We were having them installed during
 20 preventative maintenance.
 21 Q. And --
 22 A. Preventative maintenance was going on
 23 during this time.
 24 Q. And that was just good enough for First
 25 Rate?
 396

[Page 221]

[59] (Pages 218 to 221)

1 MR. ANDERSON: Object to the form;
2 argumentative.
3 Go ahead and answer.
4 THE WITNESS: It -- it's how we were
5 following the procedures.
6 Q. (BY MR. LOGAN) Right, but you had just
7 had a guest of one of your tenants killed inside an
8 apartment, and so --
9 MR. ANDERSON: What do you mean? Don't
10 be --
11 MR. LOGAN: What I mean is that McQuen
12 Forbush died on November 10th, 2012.
13 MR. ANDERSON: And this is October 11th.
14 MR. LOGAN: Right. And so --
15 MR. ANDERSON: He didn't.
16 MR. LOGAN: I'm sorry. I'm sorry. You're
17 right.
18 MR. ANDERSON: Okay.
19 Q. (BY MR. LOGAN) Let me go back. Now I'm
20 backwards on time, okay?
21 MR. ANDERSON: Gmails can do that.
22 MR. LOGAN: What's that?
23 MR. ANDERSON: Gmails go the other way.
24 Q. (BY MR. LOGAN) What do you know about
25 the Molly Collins incident?
397

[Page 222]

1 A. I know that her detector had gone off,
2 her water heater tested high, and we immediately
3 replaced it.
4 Q. Okay. And so I got a little bit
5 confused on time, and I apologize. So let me just
6 try to be as clear as I can, okay?
7 You had had an incident, and this was
8 not the first time. You had had another carbon
9 monoxide incident in October of 2012 at Sagecrest,
10 right?
11 MR. ANDERSON: Object to the form.
12 Interjection of "not the first time."
13 Q. (BY MR. LOGAN) Is that true?
14 A. Yes.
15 Q. And there had been several carbon
16 monoxide incidents prior to that within the year,
17 right?
18 A. October of --
19 Q. 2012.
20 A. There were some identified in March, but
21 we resolved them.
22 Q. Okay. So in October, there was another
23 incident involving Molly Collins, right?
24 A. Yes.
25 Q. And knowing that there had been this
398

[Page 223]

1 carbon monoxide incident where there's another
2 water heater that is a danger to the tenant and
3 their guest, right --
4 A. Yes.
5 Q. -- there was the decision made by First
6 Rate that the current scheme of installing
7 hardwired detectors over time was good enough?
8 MR. ANDERSON: Object to the form; misstates
9 the testimony and the record.
10 THE WITNESS: It was not First Rate that
11 made the sole decision. The POA assisted in that
12 decision.
13 The emergency calls had gone down
14 from -- in July of 2011 when we had replaced all
15 the water heaters. We felt we were acting
16 appropriately. We had an engineer come out and
17 give us recommendations. We gave those
18 recommendations and pricing to the owners.
19 Q. (BY MR. LOGAN) Well, let me ask you
20 about that because you've said that a few times
21 today.
22 How many of those recommendations were
23 actually put into action?
24 MR. ANDERSON: What do you mean "put into
25 action"? Like --
399

[Page 224]

1 THE WITNESS: They were given --
2 Sorry. Do you want --
3 MR. ANDERSON: Go ahead.
4 THE WITNESS: The recommendations were given
5 to the owners. If the owners responded and wanted
6 something done, then we would have done it. I
7 don't know if any responded and told us to do
8 anything. Tara would have handled that.
9 Q. (BY MR. LOGAN) Do you think that by
10 making recommendations, that's completing your
11 obligation to look after the safety of the tenants
12 and the guests at Sagecrest Apartments?
13 A. We made the recommendations and we were
14 installing CO detectors and we were testing.
15 Q. And as far as you are concerned, that
16 was good enough for First Rate?
17 A. I feel it was an appropriate action.
18 Q. Do you think that it would have been
19 appropriate to wait another year or two to install
20 a hardwired carbon monoxide detector in 4624?
21 MR. ANDERSON: Object to the form.
22 THE WITNESS: Do I think it would have been
23 appropriate to wait another year or two?
24 Q. (BY MR. LOGAN) Yes.
25 A. No. It was being done during
400

[Page 225]

[60] (Pages 222 to 225)

REPORTER'S CERTIFICATE

STATE OF IDAHO)
) ss.
COUNTY OF ADA)

I, ANDREA J. WECKER, Certified Shorthand Reporter and Notary Public in and for the State of Idaho, do hereby certify:

That prior to being examined, the witness named in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

That said deposition was taken down by me in shorthand at the time and place therein named and thereafter reduced to typewriting under my direction, and that the foregoing transcript contains a full, true and verbatim record of said deposition.

I further certify that I have no interest in the event of the action.

WITNESS my hand and seal this 14th day of July, 2014.

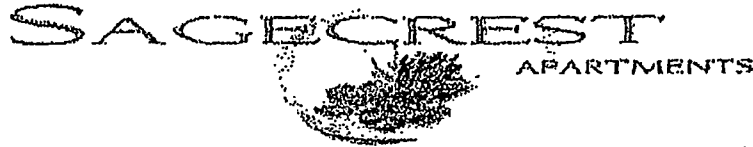


Andrea J. Wecker

ANDREA J. WECKER
RPR and Notary
Public in and for the
State of Idaho.

My Commission Expires: 2-14-17

4



1805 E. Overland Rd., Bldg. 58 • Meridian, ID 83642 • (208) 514-4304 • Fax: (208) 884-3487

Check us out on the web at: www.sagecrestapts.com

IMPORTANT!

Upon our recent inspections of the water heaters at Sagecrest we have found that your unit shows higher levels of carbon monoxide than we would like to see. The carbon monoxide is exiting through the vent on top of the water heater but does have the potential of entering the unit. It is very important if you run your dryer to keep the bi-fold doors open at all times. We have provided carbon monoxide detectors for safety precautions until your water heater can be replaced next week. Please read the instructions so it is properly placed in your apartment and you are aware of how it operates. Please do not attach them to the walls since they will be picked up once your water heater is replaced. The owner of your property has been informed of the situation. They are scheduled for replacement starting on Monday until the job is complete. Please also consider this your notice of intent to enter for the replacement. We do not have a firm schedule of what units will be completed when but are trying our best to do them quickly. If the carbon monoxide detector goes off please open all windows and contact Intermountain Gas at 377-6840. For extra safety precautions it wouldn't hurt to sleep with a couple windows open. If you would like to shut your water heater off you may turn it to "vacation" but you will not have hot water. Please call if you have any further questions or concerns. Thank you for your understanding while we all work to get this matter resolved.


Sagecrest Apartments

Exh. No.	14
Date	10/25/13
Name	Kipper
M & M Court Reporting	

MPD000303

SAGECREST

APARTMENTS



November 12, 2012

First Rate Property Management
Attention: Tony Drost and Lizz Loop
7150 Potomac
Boise, Idaho 83704

Re: FRPM Notice to Revoke Agency

Dear Tony and Lizz:

Following our discussions on November 12, 2012, as the President of the Board of Directors of the Sagecrest Multi Family Property Owners Association, Inc., I am instructing you to make no comments and to have no discussions with anyone, whether media representatives, tenants, owners or anyone concerning the recent events at Sagecrest involving the death of a young man as the alleged result of CO poisoning. As you know, we have put our insurance carrier on notice of the event. All requests for information should be directed to me at 925.228.7000 until further notice.

I am requesting that you provide written notice to the Association that you have put the insurance carrier for your company on notice of the death of the young man. I believe that our carrier will be appointing an adjuster today or tomorrow. I instruct you to only discuss the facts and circumstances of the event with our adjuster, your adjuster and the law enforcement agencies conducting the investigation. As soon as you have the contact information of your adjuster, please provide it to me so I can forward to our adjuster.

You are instructed not to publish any letter, email or statement concerning the young man's death to the current tenants at Sagecrest. Please reply to requests for information with a statement that the investigation is ongoing and that the tenants will be notified if their health or safety will be affected in any manner, which has always been the policy of Sagecrest.

You have no authority to make any statement to members of the public or media on behalf of the Sagecrest Multi Family Property Owners Association, Inc.

You have no authority to enter the unit, the investigation by our insurance adjuster and investigator requires the scene preserved. This said, the unit is not to be vacated or the scene disturbed until the insurance and our attorney released said unit.

You are not authorized to allow any tenant to break their lease as a result of the event. Pending the transfer of management, you have no authority to modify any of the current tenant leases. To the extent that there are vacant units, you do have the authority to enter into new leases on the approved lease form with the approved lease terms and rates.

Prior to the young man's death, you had given notice of your intent to withdraw from the management of the Sagecrest Multi Family Property Owners Association, Inc. and as the manager of the units owned by individuals. That notice has been accepted and we have retained the services of another management company. The date of your notice indicated that you were withdrawing on January 1, 2013. We request that the transfer of management take place as soon as is practical. The new management company indicated that they could assume management on December 1,

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2012. It is our preference that the transfer of management takes place on or before December 1, 2013 if possible. We further instruct you to provide any information requested by the new management company as soon as practical in advance of the actual transfer of management.

Please issue a check from the Association account to Verity Property Management in the sum of \$1,000 and call Steve Fender at 342-7368 so he can pick up the check from your office.

Sincerely,

Signed By Your Board

Jon Kalsbeek
President

Jay Arla
V-President

Chris Schwab
Secretary

David Meisner
Treasurer

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6



November 7, 2012
SCPOA Board of Directors Meeting Minutes
1805 E. Overland Road, # 58
Meridian, Idaho 83642

Re: Change of Management of Association and Change of Management of Property Manager

Meeting called to order at 2030mst [8:30 pm mst] by Jon Kalsbeek
Present were David Miesner, Jon Kalsbeek, by phone Chris Schwab, Jay Arla

The discussion involved the notice of termination of management from FRPM received on Friday, November 2, 2012 via email.

Jay questioned whether the notice pertained to just the POA or both POA and Property Mgmt services. It was decided it did not matter if we wanted to change companies; but we would verify with Lizz of FRPM what the notice referred too. (note: in a phone conversation with Lizz on Thursday, November 8, 2012 – Lizz stated the notice was addressing all service were being terminated).

The board discussed the options of management companies reviewed, Riverstone, Legacy, and Verity. David and Jon had personally met with Verity and reviewed services, after relaying the information provided in the meeting, the board concluded Verity would be the best fit.

A motion was made by Chris Schwab and second by Jay Arla to change management services for both POA and Property to Verity, Motion passed unanimously.

Motion to adjourn by David Miesner and a second by Chris Schwab – Meeting adjourned at 2206mst [10:06pm mst].

Respectfully submitted,
Chris Schwab
Secretary



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ORIGINAL

Michael J. Elia (ISBN 5044)
Craig D. Stacey (ISBN 7996)
MOORE & ELIA, LLP
Post Office Box 6756
Boise, Idaho 83707
Telephone: (208) 336-6900
Facsimile: (208) 336-7031

NO. _____ FILED _____
A.M. _____ P.M. 440

MAR 02 2015

CHRISTOPHER D. RICH, Clerk
By TENILLE RAD
DEPUTY

Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, d/b/a SAGECREST MULTI
FAMILY PROPERTY OWNERS"
ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

**DEFENDANT SAGECREST MULTI
FAMILY PROPERTY OWNERS'
ASSOCIATION, INC.'S MEMORANDUM
IN SUPPORT OF RECONSIDERATION
OF POA'S MOTION FOR SUMMARY
JUDGMENT**

COMES NOW Defendant Sagecrest Multi-Family Property Owner's Association, Inc.
(the "POA"), by and through its counsel of record, Michael J. Elia of the firm Moore & Elia
LLP, and hereby submits this memorandum in accordance with the Court's Notice of Intent to
Reconsider Court's Decision Denying Sagecrest's Summary Judgment dated January 14, 2015.
Attached hereto is an Affidavit of Counsel, Michael J. Elia.

**DEFENDANT SAGECREST MULTI-FAMILY PROPERTY OWNERS' ASSOCIATION,
INC.'S MEMORANDUM IN SUPPORT OF RECONSIDERATION OF POA'S MOTION
FOR SUMMARY JUDGMENT**

TR

INTRODUCTION

Respectfully, the Court erred in denying the POA's Motion for Summary Judgment by finding that there existed genuine issues of material fact with regards to whether the POA owed the Plaintiffs a duty of care. The Court's ruling is appropriately reconsidered because Idaho law and the undisputed facts demonstrate that the POA did not owe a duty of care to the Plaintiffs. The POA's CCRs and agreement with First Rate cannot as a matter of law create a duty of care to the Plaintiffs. The POA did not assume a duty of care to the Plaintiffs, and it did not own or control the premises where the injury occurred. Judgment in favor of the POA in regard to the Plaintiffs' negligence-based claims is therefore appropriate.

I. RELEVANT FACTUAL AND PROCEDURAL HISTORY

McQuen Forbush died of carbon monoxide poisoning on November 10, 2012 while staying at an apartment located in the Sagecrest Apartment Complex ("Sagecrest") in Meridian, Idaho. (*Fourth Amended Complaint*. ("FAC"), ¶ 1.) Mr. Forbush died in unit #4624, a residential apartment in a Sagecrest building owned by the Matthew Switzer Family Trust ("Switzer Trust") (FAC, ¶ 29.) Mr. Forbush and his girlfriend, Breanna Halowell, were guests of unit #4624's tenant, Adra Kipper. (FAC, ¶ 30.)

Each building at Sagecrest, containing four apartment units, is privately owned. Each owner of a Sagecrest building is a member of the POA. (*Affidavit of Craig Stacey dated July 24, 2014* ("Stacey Aff."), Ex. 2, Sec. 6.2.)

The POA is represented by, and acts through, a member-elected voluntary Board for routine activities. The POA is responsible for maintaining the common areas of Sagecrest, including the exteriors of the residential units, exterior stairs and entryways, exterior railings and

decks, street lamps, sidewalks, landscaping, drainage facilities, fencing, irrigation systems, and the common areas (which includes the parking lots, recreational center, and drainage lot). (*Id.*, Sec. 3.3(A).) The POA is responsible, subject to the rights and obligations of individual building owners, to manage and control the common areas, landscaping, sidewalks, and all improvements. (*Id.*, Sec. 8.6.)

Owners of Sagecrest buildings have the distinct, express, and exclusive responsibility to maintain the interiors of residential units they own. (*Id.*, Sec. 3.3(B) & 3.5) An owner's duty regarding the interior of his or her units include the flooring, ceilings, walls, wall coverings, appliances, plumbing and plumbing fixtures, electrical system and fixtures, and all interior components of the heating and air conditioning system. (*Id.*) Sagecrest owners also have a duty to maintain certain exterior portions of their residential units, including the outside of windows and doors, exterior air conditioning units, and all other exterior maintenance not performed by the POA. (*Id.*) The POA has no independent power or authority to perform any service, repairs, or maintenance on the interiors of the residential units. (*Id.*)

Defendant First Rate Property Management ("First Rate") contracted, separately and distinctly, with both the POA and individual owners. The contract between First Rate and the POA made First Rate the POA's agent with regards to the exterior, common areas of Sagecrest over which the POA exercised control. (*Id.*, Ex. 3.) By contrast, the contract between First Rate and the Switzer Trust made First Rate its agent with regards to the interiors of building 46. (*Id.*, Ex. 4.)

The contract between First Rate and the Switzer Trust gave First Rate the authority to make ordinary repairs and replacements reasonably necessary to preserve and maintain the

owner's units in an attractive condition and state of good repair. (*Id.*, at ¶¶ 2.5, 9.1) First Rate was required to obtain the Switzer Trust's approval for any repairs exceeding the cost of \$250.00. (*Id.* at ¶ 9.5.)

Ms. Halowell and Mr. Forbush's parents, Gretchen Hymas and Travis Forbush, filed suit on March 7, 2013. *See, Complaint*. Plaintiffs amended their complaint the next day. *See, Amended Complaint*. Plaintiffs, with leave of the Court, amended their Complaint several more times and filed their Fourth Amended Complaint on October 30, 2014. *See, Fourth Amended Complaint*. The FAC asserts three causes of action against the POA: (1) negligence (*FAC*, ¶¶ 65-71); (2) intentional infliction of emotional distress ("IIED") (*FAC*, ¶¶ 110-115); and (3) negligent infliction of emotional distress ("NIED") (*FAC*, ¶¶ 173-179).

With regard to the negligence-based claims, the FAC asserts that the POA owed the Plaintiffs a "duty to exercise reasonable care under the circumstances" (*FAC*, ¶ 66. *See also FAC* ¶ 174.), and that the POA breached such duty in the following ways:

- a. Failure to exercise reasonable care under all of the circumstances;
- b. Failure to provide and/or maintain the apartment in a safe and sanitary condition fit for human habitation;
- c. Failure to provide and/or maintain the apartment's water heater, air handler, and heating system in a reasonably safe condition;
- d. Failure to perform a reasonable inspection of the apartment – including a reasonable inspection of the apartment's water heater, air handler and ventilation system after determining the water heater was leaking carbon monoxide;
- e. Failure to test or confirm the carbon monoxide detectors were installed properly and working after delivering carbon monoxide detectors to Apartment 4624; and,
- f. Failure to adequately warn of the unreasonably dangerous condition in apartment 4624.

(*FAC*, ¶ 68. *See also FAC* ¶ 175.) The POA did not have a duty, nor did it assume a duty to perform any of these tasks. The CCR's explicitly gave control of these duties to the building owner, the Switzer Trust. The Switzer Trust then gave control to its agent, First Rate, for such

duties and tasks.

The POA moved for summary judgment on the two negligence-based claims asserted against it, but the motion was denied on December 11, 2014. On January 14, 2015 the Court entered a Notice of Intent to Reconsider Court's Decision Denying Sagecrest's Summary Judgment.¹

II. GOVERNING LAW

A motion for reconsideration may be considered at any time prior to the entry of final judgment, and up to 14 days thereafter. Idaho R. Civ. P. 11(a)(2)(b). "When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered." *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). A motion for reconsideration is a motion which allows the court—when new law is applied to previously presented facts, when new facts are applied to previously presented law, or any combination thereof—to reconsider the correctness of an interlocutory order. *Johnson v. N. Idaho Coll.*, 153 Idaho 58, 62 (2012). I.R.C.P. 11(a)(2)(B) does not expressly contain a new evidence requirement. *Int'l Real Estate Solutions, Inc. v. Arave*, 340 P.3d 465, 468 (Idaho 2014). The most important consideration is the correctness of the interlocutory order. *Johnson, supra*.

Summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c). For purposes of summary judgment, the evidence is construed liberally and all reasonable inferences

¹ With regards to the IIED claim, the FAC asserts that "Halowell suffered severe emotional distress as a direct and proximate result of the conduct of these Defendants, and as a result of PFC Forbush's death." (FAC, ¶ 115.)

are drawn in favor of the nonmoving party. *O'Guin v. Bingham County*, 139 Idaho 9, 13 (2003).

The party moving for summary judgment initially carries the burden of establishing that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence has been established, the burden then shifts to the nonmoving party to show, via further depositions, discovery responses, or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders v. Kuna Joint Sch. Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994). The nonmoving party cannot rest upon mere speculation and must submit more than just conclusory assertions that an issue of material fact exists to withstand summary judgment. *Cantwell v. City of Boise*, 146 Idaho 127, 133, 191 P.3d 205, 211 (2008). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue of material fact. *Finholt v. Cresto*, 143 Idaho 894, 897, 155 P.3d 695, 698 (2007). Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to the party's case. *Cantwell*, 146 Idaho at 133, 191 P.3d at 211.

III. DISCUSSION

Plaintiffs have alleged a general negligence theory of liability against the POA. However, they have not further articulated their legal position despite the complicated facts of this case. The facts and general allegations of the 4th Amended Complaint allow for this negligence claim against the POA to be interpreted as one based on contractual duties, assumed duties, or duties stemming from Idaho premises liability law and, therefore, each theory must be discussed on summary judgment. The POA has maintained that this claim should be ruled on as a premises liability action in which it has no duty because it is an action based on the condition of the property where the injury occurred. The POA is neither the owner or in control of the interior of unit #4624, nor has the POA assumed a duty to maintain or otherwise take action for a condition on the interior of unit #4624. The POA should have been granted summary judgment because it does not have a duty to the Plaintiffs under any negligence theory of liability.

Under Idaho law, the elements of a negligence claim are “(1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant’s conduct and the resulting injury; and (4) actual loss or damage.” *Shea v. Kevic Corp.*, 156 Idaho 540, 328 P.3d 520, 528 (2014).

Generally, the question whether a duty exists is a question of law. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 400, 987 P.2d 300, 312 (1999). Not every person or entity owes a tort duty to everyone else in all circumstances. *Boots ex rel. Boots v. Winters*, 145 Idaho 389, 393-94, 179 P.3d 352, 356-57 (Ct. App. 2008) (citing *Turpen v. Granieri*, 133 Idaho 244, 247–48, 985 P.2d 669, 672–73 (1999)). “Absent unusual circumstances, a person has no duty to prevent harm to another, regardless of foreseeability.” *Beers v. Corp. of Pres. of Church of Jesus*

Christ of Latter-Day Saints, 155 Idaho 680, 686, 316 P.3d 92, 98 (2013).

A. The POA did not owe the Plaintiffs a Contractual Duty in Regard to the Interior of Unit #4624 Based on its Agreement with First Rate or its CCRs.

The FAC can be read as attempting to rely on a contractual theory, based on the POA's agreement with First Rate or its CCRs, to establish a duty on the part of the POA with regards to the Plaintiffs. To the extent such alleged duty is purely contractual in nature, however, the Plaintiffs' claims do not sound in tort. "Where the only relation between the parties is contractual, the liability of one to the other, in an action of tort for negligence, must arise out of some positive duty which the law imposes because of the relationship or because of the negligent manner in which some act which the contract provides for is done; and the mere breach of an executory contract, where there is no general duty, cannot furnish the basis for such an action" *Taylor v. Herbold*, 94 Idaho 133, 138, 483 P.2d 664, 669 (1971) (quoting 65 C.J.S. NEGLIGENCE § 4(6), 495); *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 350, 179 P.3d 309, 313 (2008) (The mere negligent breach or non-performance of a contract will not sustain an action sounding in tort, in the absence of a liability imposed by law independent of that arising out of the contract itself); *See also Nation v. State, Dept. of Correction*, 144 Idaho 177, 189, 158 P.3d 953, 965 (2007) ("[A]n agency's internal handbook must be construed as internal guidelines if not adopted under the procedures set out in IDAPA; it does not have the force and effect of law and does not give rise to a cause of action based on an alleged violation." (internal quotation omitted)); *Cleveland Reg'l Med. Ctr., LP. v. Celtic Props., L.C.*, 323 S.W.3d 322, 351 (Tex. Ct. App. 2010) ("A company's internal policies or procedures will not create a negligence duty where none otherwise exists."); *Owens v. Comerica Bank*, 229 S.W.3d 544, 547 (Tex. Ct. App. 2007) ("The Texas Supreme Court has refused to create a standard of care or duty based upon internal

policies, and the failure to follow such policies does not give rise to a cause of action in favor of customers or others.”)

Substantively, the Plaintiffs’ contract theory erroneously assumes that because both the POA and Switzer Trust contracted with First Rate, the duties of the POA and the individual homeowner vis-à-vis unit #4624 or building 46 were co-extensive. Such was not the case. In fact, there existed a bright-line demarcation between the duties of the POA and the duties of the Switzer Trust with regard to building 46. The POA undisputedly had control over, and was thus responsible for, the common areas. An individual owner undisputedly had control over, and was thus responsible for, the interiors of his own units.

The fact that the POA and the Switzer Trust each chose to hire First Rate as their agent to fulfill their respective duties is of no legal consequence. First Rate, the agent, served two different masters, the POA and the Switzer Trust, depending on whether First Rate was fulfilling duties with regards to areas controlled by the POA or duties with regards to areas controlled by the Switzer Trust. Indeed, several individual building owners at Sagecrest contracted with another management party other than First Rate to fulfill duties with regards to the interiors of their units, further demonstrating the distinction between the duties owed by the POA and the duties owed by individual building owners. Moreover, First Rate was paid separately by the individual owners and the POA. (*See Stacey Aff.*, 07/24/2014, Ex. 4, Sec. 16.1; Ex. 3, Sec. 6.0).

In the POA’s hearing on its motion for summary judgment (“*POA’s MSJ Hearing*”), the Court held that Section 6.7(A)5(e) of the Sagecrest CCR’s gave the POA the authority to “micromanage” First Rate’s handling of the carbon monoxide issues at the Complex. (*10.30.14 Hearing on the POA’s MSJ*, p. 23, ll. 1-6). The POA respectfully disagrees that Section

6.7(A)(5)(e) gives the POA any authority to take any action on the interiors units at the complex.

That section states:

Safety and Security: Each owner and occupant of a Four Plex unit, and their respective guests and invitees, shall be responsible for their own personal safety and the security of their property in the Village. The Association may, but shall not be obligated to maintain or support certain activities within the Property designed to enhance the level of safety or security which each person provides for himself and his property. Neither the Association nor Declarant shall in any way be considered insurers or guarantors of safety or security within the Property, nor shall either be held liable for any loss or damage by reason of failure to provide adequate security or ineffectiveness of security measures undertaken.

(*Stacey Aff., Ex. 2, Sec. 5(e)*). The plain language of Sec. 5(e) places the responsibility upon owners, occupants, and guests of buildings for their own safety and security “of their property.”

Sec. 5(e) gives the POA the option, but not the obligation, to enhance the level of security of the common area at Sagecrest. However, the CCR’s cannot give the POA authority to take action in regard to the interiors of the units because the units are privately owned and the owner of each unit is the only one that could give such authority to the POA. The owners have the distinct, express, and exclusive responsibility to maintain the interiors of residential units they own. (*Id.*, Sec. 3.5).

B. The POA did not Voluntarily Assume a Duty of Care to the Plaintiffs.

In the POA’s MSJ Hearing, the Court held that whether the POA assumed a duty to the Plaintiffs was a question for the jury. (p. 23, l. 21–p. 24, l. 7). Respectfully, the Court erred finding this a jury question. The POA did not voluntarily assume a duty of care to the Plaintiffs for any interior issue in #4624.

The first circumstance giving rise to an affirmative duty of care is the existence of a special relationship. *Beers*, 155 Idaho at 686, 316 P.3d at 98; *See also Rees v. State, Dep’t of Health & Welfare*, 143 Idaho 10, 15 (2006) (“An affirmative duty to aid or protect arises only

when a special relationship exists between the parties.”). In this case, the FAC fails to allege, and the undisputed facts fail to support the existence of a special relationship between any of the POA and the Plaintiffs.

The second circumstance giving rise to an affirmative duty of care is an assumed duty based on an undertaking. “Even when an affirmative duty generally is not present, a legal duty may arise if one voluntarily undertakes to perform an act, having no prior duty to do so.” *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 350 (2008). A duty arises in the negligence context when: (1) One previously has undertaken to perform a primarily safety-related service; (2) others are relying on the continued performance of the service; and (3) it is reasonably foreseeable that legally-recognized harm could result from failure to perform the undertaking. *Beers*, 316 P.3d at 100. When a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed. *Beers*, 316 P.3d at 100.

Neither the FAC’s allegations nor the undisputed facts can be construed to show that the POA assumed a duty to the Plaintiffs. The Plaintiffs allege that the POA’s hiring of an engineering firm to assess carbon monoxide and water heater issues as evidence of the POA’s assumption of a duty. The Plaintiffs also erroneously cite the fact that First Rate engaged in carbon monoxide testing in some buildings as an agent of the POA.

Plaintiffs’ arguments are unavailing, however, because the POA’s limited actions including; hiring an engineering firm, gathering and providing information to individual owners, and helping the property management company create carbon monoxide testing procedures does not give rise to an affirmative duty with regards to substantive repairs or actions within a specific unit for several reasons. First, an assumed duty is limited to the duty actually assumed. *Beers*,

155 Idaho 680, 316 P.3d 92, 100. Second, Plaintiffs must show reliance on the continued performance of the alleged service. *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673 (1999) (The underlying policy [of an assumed duty] arises from a person voluntarily assuming a position, and by filling that position another can reasonably rely on that person to act with reasonable care and provide protection from unreasonable risks of harm); *Gagnon v. W. Bldg. Maint., Inc.*, 155 Idaho 112, 115, 306 P.3d 197, 200 (2013) (A duty can arise from undertaking a duty which induces reliance); *Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 688-89, 316 P.3d 92, 100-01 (2013) (Defendants' actions did not reflect the assumption of a duty which the injured party could reasonable rely.)

The act of gathering and providing information to decision-makers is not assumption of a duty with regards to repairs; those acts are wholly distinct. The POA had authority to hire an engineering firm and provide information to owners, but the POA had no authority to perform repairs in the Switzer Trust's building or unit interior. First Rate understood this fact because it asked Mr. Switzer if he wanted to replace the water heaters, not the POA. *See, e.g.*, July 29, 2011 email from Sheila Thomason to various owners attached to the *Dec. of Tyson E. Logan in Opp. to Defendants Kalsbeek, Arla, Schwab, and Meisner's Mot. for Summ. J.*, Ex. 4, FR7100 ("Please let me know which building you own and if I have approval to replace your water heater(s) listed."); August 3, 2011 email exchange between Mr. Kalsbeek, Mr. Drost and others attached to the *Aff. of John M. Howell dated, Dec. 5, 2014*, Ex. A (water heaters are interior items of each unit and is therefore an owners' choice on how to handle this situation); (*Depo. of Liz Loop*, Vol. II, 332:8-14) (decision to replace water heaters was a decision for the owner) (attached to the *Aff. of Robert A. Mills in Support of Def. Drost's MSJ.*, Ex. S).

Significantly, on November 9, 2011, First Rate emailed the Switzer Trust, set forth the recommendations from Engineering Consultants, Inc. and provided responsive options, including replacing the water heater at a cost of \$650 and installing a CO detector at a cost of \$62.48 per unit. (*Dec. of Eric R. Clark in Opp. to Defendant Switzer's MSJ.*, Ex. 11, FR3001-3002.) The Switzer Trust chose not to implement any of the options. (*See Id.*, Ex. 12; *Pltfs.' Resp. in Opp. to Switzer's MSJ.*, 5.) The undisputed facts demonstrate that the decision to replace the water heater or install a carbon monoxide detector in #4624 lay solely with the Switzer Trust, not the POA.

The Plaintiffs also allege that First Rate conducted carbon monoxide testing in some Sagecrest buildings on behalf of the POA. However, the fact that First Rate did not conduct carbon monoxide testing in all the buildings is enlightening. There were several buildings at the complex for which First Rate was not the property manager. (*Deposition of Tara Gaertner*, p. 445, ll. 2-14; *Exs. 59, 73.*)² As discussed in Sec. I, *ante*, First Rate served multiple masters. In conducting carbon monoxide testing, First Rate was serving only as the agent for individual owners and only tested for carbon monoxide in the units they managed. (*Id.*, p. 444, l. 15–p. 445, l. 14; *Exs. 59, 73.*) Had First Rate been acting as the agent of the POA in conducting carbon monoxide testing, it would have tested all buildings, regardless of whether that building's owner had contracted with First Rate individually, because all building owners were members of the POA.

Further, First Rate only tracked and contracted for preventative maintenance services in the buildings for which it managed. (*Id.*, p. 150, ll. 12-25) First Rate also only communicated with the owners for the buildings it managed regarding the repairs recommended by the

² The cited sections of Tara Gaertner's deposition are attached as Exhibit 1 to the *Affidavit of Counsel*, Michael J. Elia submitted contemporaneously to this motion.

engineering firm, ECI, to assess the issues with the water heaters. (*Id.*, p. 266, l. 20 – p. 268, l. 23; p. 319, l. 2–p. 320, l. 3). In fact, First Rate did not even have contact information for the owners of the units in which it did not manage. (*Id.*)

Furthermore, the POA never set foot or made repairs in unit #4624. Such evidence renders it impossible to find that the POA ever voluntarily assumed a duty to the Plaintiffs. The POA's limited actions did not give rise to an affirmative duty to the Plaintiffs.

Additionally, the Plaintiffs have not alleged and cannot show any reliance on the POA by them on the continued performance of an assumed duty. *See Beers*, 316 P.3d at 100 (A duty arises in the negligence context when...others are relying on the continued performance of the service). The Plaintiffs in this case have never spoken to any members of the POA Board. (*Deposition of Breanna Halowell*, p. 456, ll. 16-22; p. 428, ll. 10-12).³ Likewise, the tenant of unit #4624, Adra Kipper, stated that she had never spoken with, or even knew of, any of the Board members of the POA. (*Deposition of Adra Kipper*, p. 257, ll. 4-17).⁴ Ms. Kipper did not know that there was a property owner's association until the day before her deposition. (*Id.*, p. 225, l. 25–p.226, l. 10). First Rate was the only entity she dealt with in regard to maintenance of her unit. (*Kipper Depo.*, p. 25, ll. 8-12; p. 54, ll. 10-16). In essence, First Rate was the entity Adra Kipper relied on for any maintenance in #4624. Without knowledge of the existence of the POA there could be no reliance on it by a tenant or guest for an alleged assumed duty.

Another important aspect of an alleged assumed duty in this instance is that the POA, as a matter of law, did not control #4624 and could not assume any control over the interior of unit

³ The cited sections of Breanna Halowell's deposition are attached as Exhibit 1 to the *Affidavit of Counsel, Michael J. Elia* submitted contemporaneously to this motion.

⁴ The cited sections of Adra Kipper's deposition are attached as Exhibit 4 to the *Affidavit of Counsel, Michael J. Elia* submitted contemporaneously to this motion.

#4624. First Rate had authority as sole agent of the Switzer Trust to control the interior of #4624 to manage repairs and maintenance duties. First Rate could not relinquish this duty to the POA without Mr. Switzer's approval. There is no evidence to indicate that Mr. Switzer gave the POA any authority over the interior of unit #4624 for any maintenance or repair issues.

This is a situation analogous to *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 8 P.3d 1254 (Ct. App. 2000), where the Court held that one who has no right to control or enter adjacent property, owes no duty of care on that property.⁵ It logically follows that one could not assume a duty to maintain conditions of the private property of another, and have the tenant rely on such an assumption of duty, without the landowner's permission.

C. The POA did not Owe the Plaintiffs a Premises-based Duty of Care Because it did not Own or Control Unit #4624.

The Plaintiffs have never explicitly alleged that the source of the duty owed them by the POA is premises liability but have alleged negligence and injuries resulting from conditions on the property of the Sagecrest complex. However, the POA did not owe the Plaintiffs a premises-based duty of care because it did not own or control #4624. "Idaho courts have maintained that the duty of owners and possessors of land is determined by the status of the person injured on the land (i.e., whether the person is a invitee, licensee or trespasser)." *Holzheimer v. Johannesen*, 125 Idaho 397, 399, 871 P.2d 814, 816 (1994). It is undisputed that the Switzer Trust owned #4624 in which Mr. Forbush died, and Adra Kipper was the tenant thereof. *See, e.g., Robinson v. Mueller*, 156 Idaho 237, 241, 322 P.3d 319, 323 (2014) ("The tenant essentially occupies the position of landowner with respect to guests of the tenant. This is because the tenant is the individual in control of the premises during the lease and the tenant has control over the guests

⁵ Defendant does not try to argue that the Court determined whether Honker's did or did not assume a duty.

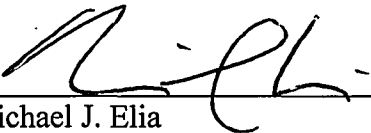
hosted in the apartment.” (emphasis added); *Heath v. Honker’s Mini-Mart, Inc.*, 134 Idaho 711, 8 P.3d 1254 (2000) (No duty owed to plaintiff where defendant “neither owned, occupied, nor controlled the premises upon which [the plaintiff] fell and was injured.”). Thus the POA cannot, as a matter of law, be held liable for injuries to the Plaintiffs through Idaho premises liability law

IV. CONCLUSION

For the reasons stated herein, the Court’s denial of the POA’s Motion for Summary Judgment is appropriately reconsidered, and judgment as a matter of law should be entered in favor of the POA.

DATED this 2nd day of March 2015.

MOORE & ELIA, LLP



Michael J. Elia
Attorneys for Defendant Sagecrest Multi-Family
Property Owners’ Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of March, 2015, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

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**DEFENDANT SAGECREST MULTI-FAMILY PROPERTY OWNERS' ASSOCIATION,
INC.'S MEMORANDUM IN SUPPORT OF RECONSIDERATION OF POA'S MOTION
FOR SUMMARY JUDGMENT**

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NO. _____ FILED _____
A.M. _____ P.M. 440

MAR 02 2015

CHRISTOPHER D. RICH, Clerk
By TENILLE RAD
DEPUTY

Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

VS.

SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, d/b/a SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

AFFIDAVIT OF COUNSEL MICHAEL J. ELIA IN SUPPORT OF DEFENDANT SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC.'S MEMORANDUM IN SUPPORT OF OF POA'S MOTION FOR SUMMARY JUDGMENT

STATE OF IDAHO)
 : ss
County of Ada)

Michael J. Elia, being first duly sworn upon oath deposes and states as follows:

1. I am one of the attorneys representing Defendant Sagecrest Multi-Family Property Owners' Association in this litigation.

2. Attached hereto as Exhibit 1 are true and correct copies of pages 428 and 456 from the deposition of Breanna Halowell, Vol. III.

AFFIDAVIT OF COUNSEL MICHAEL J. ELIA IN SUPPORT OF DEFENDANT SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC.'S MEMORANDUM IN SUPPORT OF RECONSIDERATION OF POA'S MOTION FOR SUMMARY JUDGMENT

NT001860

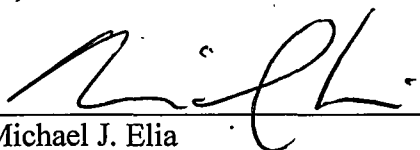
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3. Attached hereto as Exhibit 2 are true and correct copies of pages 150, 266, 267, 268, 319, 320, 444, 445 from the deposition of Tara Gaertner.

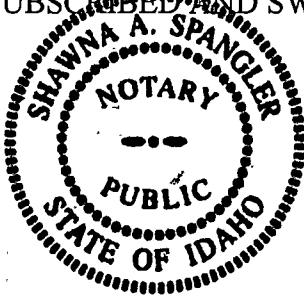
4. Attached hereto as Exhibit 3 are true and correct copies of Exhibits 59 & 73 referenced in the deposition of Tara Gaertner.

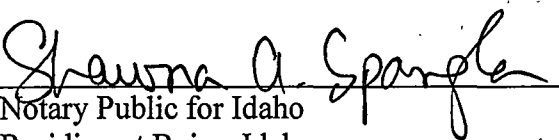
5. Attached hereto as Exhibit 4 are true and correct copies of pages 25, 54, 225, 226, and 257 from the deposition of Adra Kipper, Vol. I and II.

DATED this 2nd day of March, 2015.


Michael J. Elia

SUBSCRIBED AND SWORN TO BEFORE me on this 2nd day of March, 2015.




Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 2-15-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of March, 2015, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

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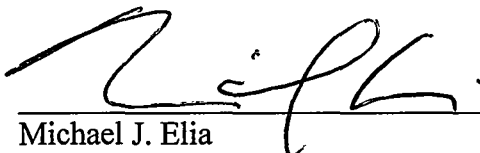
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Michael J. Elia



889864

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, et al.,)
)
 Plaintiffs,)
)
 vs.) Case No. CV-PI-2013-04325
)
 SAGECREST MULTI FAMILY PROPERTY)
)
 OWNERS' ASSOCIATION, INC., et al.,)
)
 Defendants.)
)
)

DEPOSITION OF BREANNA HALOWELL

VOLUME III (Pages 409 - 508)

FEBRUARY 26, 2014

REPORTED BY:
ANDREA L. CHECK, CSR No. 748, RPR
Notary Public

1 A. I could have.

2 Q. Have you spoken with any representative or
3 employee of First Rate Property Management regarding the
4 November 10th, 2012, incident?

5 A. No.

6 Q. Have you spoken -- have you ever spoken with
7 any representative or employee of First Rate Property
8 Management?

9 A. Not that I'm aware of, no.

10 Q. Have you ever spoken with an individual named
11 Jon Kalsbeek?

12 A. Not that I recall.

13 Q. Have you ever spoken with an individual named
14 Tony Drost?

15 A. Not that I recall, no.

16 Q. Do you know who Tony Drost is?

17 A. Yeah.

18 Q. Who is he?

19 A. Isn't he the one that owns the First Rate
20 Property Management?

21 Q. That's who you think he is?

22 A. I know he has something to do with the
23 apartments, either the First Rate Property Management or
24 A.O. Smith -- or the company.

25 Q. Your knowledge as to that has come because of

1 Have you continued to do that sort of thing?

2 A. I believe that we've performed once at the --
3 we had a Christmas show in December that we performed
4 at, and since then we haven't performed anywhere.

5 Q. Any other activities or hobbies that you've
6 taken part in since the December deposition that you
7 picked up?

8 A. No.

9 Q. You talked about Mr. Zenor and Mr. Whiting.
10 Have you had any additional communication with them -- I
11 know we've talked about the prior emails with those
12 two -- have you had any additional communications with
13 those two individuals since whenever your last contact
14 with them had been?

15 A. No.

16 Q. And I think Mr. Mills asked you this, but I
17 just want to make sure that -- have you had any
18 communication, whatsoever, other than what you've talked
19 about, with anybody associated with the POA, property
20 owners' association, any building owners, any tenants,
21 anything of that nature?

22 A. No.

23 Q. There's been some testimony that Chad Hymas --
24 do you know Chad?

25 A. Yeah.



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as
the natural parents of
PRIVATE FIRST CLASS McQUEN C.
FORBUSH, USMC (Deceased),
and BREANNA HALOWELL,

Plaintiffs,

vs.

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an
Idaho non-profit corporation,
d/b/a SAGECREST MULTIFAMILY
PROPERTY OWNERS' ASSOCIATION,
et al.,

Defendants.

DEPOSITION OF TARA GAERTNER

January 2 and 3, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

1 some examples of things that would not be
2 complex-wide that you would be contacting an owner?

3 A. Sometimes people requested to have pets,
4 so I would call and say, "Hey, can this person have
5 a pet?" "This tenant is requesting a ceiling fan
6 being put in," things like -- of that nature.

7 Q. Okay.

8 A. If rent wasn't paid on time, I would
9 contact them about that.

10 MR. ANDERSON: "Them" being the owners?

11 THE WITNESS: Yes. Sorry.

12 Q. (BY MS. WILLMAN) Now, with regard to
13 preventative maintenance, was that something that
14 was considered a complex-wide matter or was that
15 considered something that was just for the property
16 owners' association?

17 A. It was complex-wide.

18 Well, are you talking about all the
19 units in that complex or just the ones that we
20 manage?

21 Q. Just the ones that First Rate managed.

22 A. Yes. It was complex-wide.

23 Q. So for preventative maintenance issues,
24 you would contact Jon?

25 A. I wouldn't really contact anybody. I

1 that we would need our own, that it was unfair that
2 we ask Express Plumbing to use theirs.

3 Q. (BY MR. HOWELL) Okay. When you say "we
4 continue to test," what do you mean by that?

5 A. "We" as in Sagecrest Apartments.

6 Q. Okay. Well, who was testing prior to
7 this time?

8 A. Prior to which time?

9 Q. Whatever we're talking about right now,
10 the time frame of the purchase, which you didn't
11 know when it happened.

12 So you said, "If we continue to test."
13 Who was -- who was doing the testing?

14 A. I guess I'm concerned about -- I'm
15 confused about which time frame you're talking
16 about because Express Plumbing had come out and
17 tested.

18 Q. Okay.

19 A. So I guess I don't -- I don't know.

20 Q. Okay. Now, were there times that you
21 personally would communicate with all of the owners
22 at Sagecrest?

23 A. I think I had sent a couple universal
24 e-mails that went to all the owners.

25 Q. Did you have an e-mail list for all the

1 owners?

2 A. Yes, I believe so.

3 Q. Did you do that just by e-mail, or were
4 there other methods to communicate with all of the
5 owners?

6 A. We had their phone numbers as well.

7 Q. Did you ever send letters by mail?

8 A. I don't recall if we sent letters.

9 Q. Okay. How often would you communicate
10 with all of the owners?

11 A. I -- I don't know.

12 Q. Can you give me an example of when you
13 would do that?

14 A. Whenever there was something that needed
15 to be communicated to all the owners.

16 Q. Such as?

17 A. The bids for the work that was
18 recommended by ECI.

19 Q. That was something that you communicated
20 to all of the owners?

21 A. Correct.

22 Q. Okay. And you sent out a mass e-mail,
23 so to speak?

24 A. Yes.

25 Q. Did you send that e-mail out to every

1 owner of a Sagecrest building or only the ones that
2 First Rate managed?

3 A. Only the ones that First Rate managed.

4 Q. Why is that?

5 A. We didn't have the information for the
6 other owners in our files, and we didn't manage
7 those -- those buildings.

8 Q. Did you ever communicate directly with
9 any of the owners of the units or buildings that
10 you did not -- that First Rate did not manage?

11 A. There was two of them that I remember
12 talking to. One of the guys would bring in his HOA
13 payment. He would bring it in and drop it off at
14 our office.

15 The other lady, I don't recall her name,
16 would come in and pick up filters from the office.

17 Q. Okay. Would you charge her for those
18 filters?

19 A. I don't believe so.

20 Q. It's just something that you --

21 A. Provided.

22 Q. Okay.

23 A. Yeah.

24 Q. You testified about providing notice to
25 the tenants when you went in and performed testing.

1 MR. CLARK: Okay.

2 MR. HOWELL: The e-mail is dated November 9,
3 2011. It begins "Attention owners." I'm showing
4 the witness.

5 THE WITNESS: Uh-huh.

6 MR. HOWELL: On the next page, there's --
7 well, the bottom of the page starts, "Below are the
8 recommendations from the HVAC engineer to solving
9 the CO problem in the units."

10 Q. (BY MR. HOWELL) This is the e-mail you
11 were referring to, correct?

12 A. I believe so.

13 Q. And then you had Options A, B, and C,
14 correct?

15 A. Yes.

16 Q. And then one of the options is, the
17 bottom one, replace the smoke detectors with the
18 combo -- and I'm paraphrasing -- detector for
19 \$62.48 per unit, correct?

20 A. Yes.

21 Q. Okay. This was sent to all owners that
22 First Rate managed?

23 A. All owners at Sagecrest --

24 Q. Okay.

25 A. -- that First Rate managed at Sagecrest

1 Apartments. Not all of the others.

2 Q. Thank you.

3 A. Okay.

4 Q. The cost of the combo detector would be
5 an owner cost, right?

6 A. Yes.

7 Q. And that would be added on their bill.
8 Is that how that worked?

9 A. I don't know how the accounting part
10 works.

11 Q. Okay. Were there any owners that
12 objected to installing a combo detector?

13 A. It sounds familiar, but I don't know for
14 sure.

15 Q. At \$62 and some-odd cents, that would be
16 something that would be within your authority to
17 simply install, correct?

18 MR. ANDERSON: Form.

19 Go ahead.

20 THE WITNESS: I had asked Jon if that was
21 something we could install automatically or if I
22 needed to get the owners' permission.

23 Q. (BY MR. HOWELL) And what did --

24 A. He stated we needed to get the owners'
25 permission.

1 A. The build -- the building numbers went
2 up to building 57. It started with Building
3 No. 10.

4 Q. Right.

5 A. So there was no building No. 1, 2, 3.

6 Q. Okay. But in total, if you add them all
7 up, there's 57 buildings?

8 A. No.

9 MR. ANDERSON: No. She just explained that.
10 There's 47. 57 minus 10 is 47.

11 MS. WILLMAN: Oh, got it. I'm tracking now.

12 MR. ANDERSON: We had to go through that,
13 too.

14 MS. WILLMAN: Okay.

15 Q. (BY MS. WILLMAN) So Unit 1011 here, we
16 would call that Building No. 10, correct?

17 A. Correct.

18 Q. And then the next one, like Unit 1111,
19 that's Building 11?

20 A. Yes.

21 Q. Okay. Then I don't see any Building 12
22 on here.

23 Is that correct?

24 A. Yes.

25 Q. And there's no No. 14?

1 A. Yes.

2 Q. And so if we look at Exhibit 73, it
3 looks like you have Building 12 and Building 14
4 shaded?

5 A. Yes.

6 Q. Is that shaded because those were the
7 buildings you did not manage?

8 A. Correct.

9 Q. So it's fair to say that any of the
10 buildings shaded on 73 or any of the buildings
11 missing on 59 are ones that you didn't manage --

12 A. Correct.

13 Q. -- or First Rate didn't manage?

14 A. Yes.

15 Q. Okay. When you tested on March 9th, did
16 you test all the units in that one day?

17 A. I don't -- I don't remember.

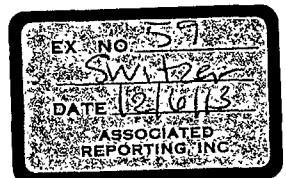
18 Q. So you don't remember if you did it all
19 on Friday or you'd started on Thursday and then did
20 more on Friday?

21 A. I don't know for sure.

22 Q. Do you remember on any of the times when
23 you did testing whether you were able to complete
24 it all in one day or if it lasted more than one
25 day?



Unit #	Floor Plan	Aug-11	Nov-11	Mar-12	Jun-12	Sep-12
1011	C	8	1	10	0	0
1012	C	10	2	10	0	0
1023	C	11	4	14	0	0
1024	C	10	7	15	0	0
1111	A	4	3	15	0	0
1112	A	8	2	13	0	0
1123	A	18	2	6	0	0
1124	A	24	14	11	0	0
1311	C	14	18	Replaced, no test	0	0
1312	C	6	14	Replaced, no test	0	0
1323	C	4	12	15	0	0
1324	C	4	4	Replaced, no test	0	0
1511	C	8	8	Replaced, no test	0	0
1512	C	160	185	301	0	0
1523	C	14	1	24	0	0
1524	C	10	10	25	0	0
1611	A	10	14	Replaced, no test	0	0
1612	A	2200	16	Replaced, no test	0	0
1623	A	16	2	Replaced, no test	0	0
1624	A	18	20	Replaced, no test	0	0
1711	C	22	33	120	0	0
1712	C	10	12	15	0	0
1723	C	12	10	0	0	0
1724	C	6	14	Replaced, no test	0	0
1811	A	4400	18	Replaced, no test	0	0
1812	A	480	18	Replaced, no test	0	0
1823	A	2200	18	Replaced, no test	0	0
1824	A	2200	20	Replaced, no test	0	0
1911	C	10	12	21	0	0
1912	C	10	8	Replaced, no test	0	0
1923	C	10	10	29	0	0
1924	C	10	13	Replaced, no test	0	0
2011	A	11	16	27	0	0
2012	A	10	16	19	0	0
2023	A	11	14	17	0	0



2024	A	11	14	16	0	0
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2111	A	10	12	8	0	0
2112	A	4	10	8	0	0
2123	A	10	10	21	0	0
2124	A	10	10	23	0	0

2211	C	0	14	17	0	0
2212	C	3	6	Replaced, no test	0	0
2223	C	8	14	7	0	0
2224	C	7	10	13	0	0

2311	C	650	0	Replaced, no test	0	0
2312	C	10	16	13	0	0
2323	C	14	26	6	0	0
2324	C	16	13	3	0	0

2511	C	6	20	6	0	0
2512	C	6	22	13	0	0
2523	C	8	8		0	0
2524	C	9	2	17	0	0

2611	C	8	26	35	0	0
2612	C	6	10	6	0	0
2623	C	10	20	1	0	0
2624	C	12	13	15	0	0

2711	A	2700	12	no test	0	0
2712	A	260	12	15	0	0
2723	A	2108	12	no test	0	0
2724	A	130	14	no test	0	0

2811	C	102	0	no test	0	0
2812	C	16	15	no test	0	0
2823	C	105	8	2	0	0
2824	C	110	23	11	0	0

2911	C	8	4	169	0	0
2912	C	43	10	36	0	0
2923	C	2200	0	no test	0	0
2924	C	37	8	no test	0	0

3011	B	23	18	11	0	0
3012	B	18	8	20	0	0
3023	B	70	90	563	0	0
3024	B	16	16	11	0	0

3111	C	2	10	30	0	0
3112	C	14	18	21	0	0
3123	C	1	10	30	0	0
3124	C	2	10	9	0	0

3211	C	23	13	9	0	0
3212	C	12	16	36	0	0
3223	C	14	18	28	0	0
3224	C	2222	14	no test	0	0

3311	A	2300	15	no test	0	0
3312	A	910	16	no test	0	0
3323	A	223	10	13	0	0
3324	A	12	17	23	0	0

3411	C	1200		no test	0	0
3412	C	23	18	25	0	0
3423	C	12	12	12	0	0
3424	C	2126	14	no test	0	0

3511	C	120	14	330	0	0
3512	C	104	4	15	0	0
3523	C	70	14	30	0	0
3524	C	12	10	11	0	0

3611	C	1		0	0	0
3612	C	2	13	28	0	0
3623	C	1		21	0	0
3624	C	2	10	7	0	0

3711	C	14	10	21	0	0
3712	C	19	22	no test	0	0
3723	C	6	14	0	0	0
3724	C	12	24	279	0	0

3811	C	6	16	10	0	0
3812	C	0	10	10	0	0
3823	C	2	12	10	0	0
3824	C	1	10	10	0	0

3911	B	6	10	34	0	0
3912	B	29	14	13	0	0
3923	B	550	22	8/3/2011	0	0
3924	B	18	2	1720	0	0

4011	C	17	16	11	0	0
4012	C	26	30	26	0	0

4023	C	18	16	32	0	0
4024	C	18	17	15	0	0

4111	A	20	13	35	0	0
4112	A	16	20	821	0	0
4123	A	2319	20	8/3/2011	0	0
4124	A	30	22	18	0	0

4211	C	2035	16	8/3/2011	0	0
4212	C	16	31	958	0	0
4223	C	8	31	50	0	0
4224	C	30	364	11/18/2011	0	0

4311	B	1	12	26	0	0
4312	B	2	14	22	0	0
4323	B	12	900	11/18/2011	0	0
4324	B	0	15	831	0	0

4411	A	2201	0	8/3/2011	0	0
4412	A	2200	0	8/3/2011	0	0
4423	A	No Gas	13	32	0	0
4424	A	450	2	8/3/2011	0	0

4511	A	150	8	26	0	0
4512	A	42	16	1775	0	0
4523	A	110	14	35	0	0
4524	A	94	12	3/7/2011	0	0

4611	B	18	22	100	0	0
4612	B	26	2	15	0	0
4623	B	8	12	1/7/2011	0	0
4624	B	32	0	100	0	0

4711	B	24	12	24	0	0
4712	B	2400	14	1/11/1900	0	0
4723	B	300	12	8/3/2011	0	0
4724	B	7	10	22	0	0

4811	A	10	9	31	0	0
4812	A	70	14	17	0	0
4823	A	300	14	13	0	0
4824	A	7	14	26	0	0

4911	A	13	3	70	0	0
4912	A	12	10	new	0	0
4923	A	12	12	13	0	0
4924	A	12	8	28	0	0

5011	B	2100	12	10	0	0
5012	B	350	14	11	0	0
5023	B	12	12	61	0	0
5024	B	450	14	0	0	0

5211	B	25	12	30	0	0
5212	B	18	12	6	0	0
5223	B	16	14	155	0	0
5224	B	8	14	7	0	0

5311	C	4	14	1	0	0
5312	C	6	8	8	0	0
5323	C	2082	8	15	0	0
5324	C	18	16	11	0	0

5411	C	47	16	11/2/2011	0	0
5412	C	27	15	43	0	0
5423	C	12	14	88	0	0
5424	C	16	12	30	0	0

5511	B	2180	14	15	0	0
5512	B	11	20	11	0	0
5523	B	2067	18	2	0	0
5524	B	18	12	20	0	0

5611	C	9	6	41	0	0
5612	C	16	22	22	0	0
5623	C	6	12	42	0	0
5624	C	111	13	2	0	0

5711	C	18	8	1/10/2012	0	0
5712	C	10	10	115	0	0
5723	C	6	15	11	0	0
5724	C	14	10	0	0	0

#58

Unit box that is purple= we don't manage this building

Address	Floor Plan	Water Heater Replaced	Water Heater Serial Number	Water Heater Model Number
1805 E Overland #1011	C	10	K04J017627	GCV 40 100
1805 E Overland #1012	C	10	K04J01593	GCV 40 100
1805 E Overland #1023	C	14	K04J017776	GCV 40 100
1805 E Overland #1024	C	15	K04J017629	GCV 40 100

1805 E Overland #1111	A	15	K04J017634	GCV 40 100
1805 E Overland #1112	A	13	K04J017701	GCV 40 100
1805 E Overland #1123	A	10	FK12498215	MI40T6FBN
1805 E Overland #1124	A	11	K04J017662	GCV 40 100

weather strip door

1805 E Overland #1211	A			
1805 E Overland #1212	A			
1805 E Overland #1223	A			
1805 E Overland #1224	A			

1805 E Overland #1311	C	3/1/10		
1805 E Overland #1312	C	Yes		
1805 E Overland #1323	C 15	Original	K04J017647	GCV 40 100
1805 E Overland #1324	C	Yes		

1805 E Overland #1411	A			
1805 E Overland #1412	A			
1805 E Overland #1423	A			
1805 E Overland #1424	A			

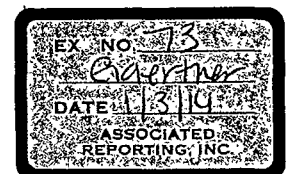
1805 E Overland #1511	C	11/29/11		GCV 40 100
1805 E Overland #1512	C	30	K04J017694	GCV 40 100
1805 E Overland #1523	C	21	K04J017623	GCV 40 100
1805 E Overland #1524	C	25	K04J017641	GCV 40 100

344
Test again

1805 E Overland #1611	A	8/3/11	RHLN0411Z00177	22V50F1
1805 E Overland #1612	A	8/3/11	RHLN0311Z10577	22V50F1
1805 E Overland #1623	A	8/3/11	RHLN04Z001555	22V50F1
1805 E Overland #1624	A	8/3/11	RHLN0411Z00141	22V50F1

1805 E Overland #1711	C	170	K04J017620	GCV 40 100
1805 E Overland #1712	C	15	K04J017650	GCV 40 100
1805 E Overland #1723	C	0	K04J017789	GCV 40 100
1805 E Overland #1724	C	1/8/12		GCV 40 100

1805 E Overland #1811	A	7/19/11	RHLN0511Z09594	22V50F1
1805 E Overland #1812	A	8/3/11	RHLN0511Z06986	22V50F1
1805 E Overland #1823	A	8/3/11	RHLN0511Z06980	22V50F1



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1805 E Overland #1824	A	8/3/11	RHLN0511Z06981	22V50F1
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1805 E Overland #1911	C	21	K04J017594	GCV 40 100
1805 E Overland #1912	C	12/1/11		
1805 E Overland #1923	C	29	K04J017774	GCV 40 100
1805 E Overland #1924	C	12/1/11		

1805 E Overland #2011	A	27	Cannot read	
1805 E Overland #2012	A	19	27 K04J01928	GCV 40 100
1805 E Overland #2023	A	17	Cannot read	
1805 E Overland #2024	A	16	Cannot read	

1805 E Overland #2111	A	8	K04J017612	GCV 40 100
1805 E Overland #2112	A	8	1113J007090	GCV 50 300
1805 E Overland #2123	A	21	Cannot Read	
1805 E Overland #2124	A	25	K04J017622	GCV 40 100

1805 E Overland #2211	C	17	K04J017728	GCV 40 100
1805 E Overland #2212	C	5/16/11	K04J017649	GCV 40 100
1805 E Overland #2223	C	7	K04J017626	GCV 40 100
1805 E Overland #2224	C	13	K04J017754	GCV 40 100

1805 E Overland #2311	C	8/1/11	RHLN0411Z00171	22V50F1
1805 E Overland #2312	C	13	K04J017748	GCV 40 100
1805 E Overland #2323	C	6	K04J017748	GCV 40 100
1805 E Overland #2324	C	3	K04J017621	GCV 40 100

1805 E Overland #2411	A			
1805 E Overland #2412	A			
1805 E Overland #2423	A			
1805 E Overland #2424	A			

1805 E Overland #2511	C	6	K04J017744	GCV 40 100
1805 E Overland #2512	C	13	K04J017683	GCV 40 100
1805 E Overland #2523	C	1	K04J017699	GCV 40 100
1805 E Overland #2524	C	17	Cannot read	

1805 E Overland #2611	C	55	K04J017632	GCV 40 100
1805 E Overland #2612	C	6	K04J017633	GCV 40 100
1805 E Overland #2623	C	9	K04J017615	GCV 40 100
1805 E Overland #2624	C	15	K04J017727	GCV 40 100

1805 E Overland #2711	A	8/3/11	RHLN0311Z10580	22V50F1
1805 E Overland #2712	A	15	K04J017674	GCV 40 100
1805 E Overland #2723	A	8/3/11	RHLN0311Z0586	22V50F1
1805 E Overland #2724	A	1/12/12		

vacant

locks changed

1805 E Overland #2811	C	9/20/11	RHLN0711Z06354	22V50F1
1805 E Overland #2812	C	Yes	101J003292	GCV 40 100
1805 E Overland #2823	C	2	D933J007383	GCV 40 100
1805 E Overland #2824	C	11	K0J0177669	GCV 40 100
1805 E Overland #2911	C	169/31	EM11341165	MI40T6FBN
1805 E Overland #2912	C	36	E07J039932	GS640YBRT
1805 E Overland #2923	C	8/3/11	RHLN0411Z00172	22V50F1
1805 E Overland #2924	C	1/23/12		
1805 E Overland #3011	B	11	K04J017788	GCV 40 100
1805 E Overland #3012	B	20	Cannot Read	
1805 E Overland #3023	B	563	Cannot Read	Replace
1805 E Overland #3024	B	11	K04J017748	GCV 40 100
1805 E Overland #3111	C	20	K04J017689	GCV 40 100
1805 E Overland #3112	C	21	K04J017664	GCV 40 100
1805 E Overland #3123	C	30	K04J017745	GCV 40 100
1805 E Overland #3124	C	91	K04J017635	GCV 40 100
1805 E Overland #3211	C	9	E610805511	MI40T6FBN
1805 E Overland #3212	C	36	K04J017644	GCV 40 100
1805 E Overland #3223	C	23	K04J017723	GCV 40 100
1805 E Overland #3224	C	8/3/11	RHLN0711Z05232	22V50F1
1805 E Overland #3311	A	8/3/11	RHLN0611Z09830	22V50F1
1805 E Overland #3312	A	8/3/11	RHLN0611Z09850	22V50F1
1805 E Overland #3323	A	13	RHLN0506Z00760	22V50F1
1805 E Overland #3324	A	23	L04J034369	GCV 40 100
1805 E Overland #3411	C	8/3/11	RHLN0411Z00164	22V50F1
1805 E Overland #3412	C	25	L04J034366	GCV 40 100
1805 E Overland #3423	C	12	L04J034363	GCV 40 100
1805 E Overland #3424	C	8/3/11	RHLN0411Z00163	22V50F1
1805 E Overland #3511	C	330/50	6D13334994	MI40T6FBN
1805 E Overland #3512	C	15	ED10429023	MI40T6FBN
1805 E Overland #3523	C	20	L04J034365	GCV 40 100
1805 E Overland #3524	C	11	L04J034395	GCV 40 100
1805 E Overland #3611	C	0	K04J017654	GCV 40 100
1805 E Overland #3612	C	28	K04J017685	GCV 40 100
1805 E Overland #3623	C	21	L04J0134367	GCV 40 100
1805 E Overland #3624	C	7	L04J034371	GCV 40 100
1805 E Overland #3711	C	21	K04J017672	GCV 40 100
1805 E Overland #3712	C	4/14/11	RHLN0311Z04645	22V50F1

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1805 E Overland #3723	C	0	K04J017596	GCV 40 100
1805 E Overland #3724	C	27/11	RM12763730	MI40T6FBN

1805 E Overland #3811	C	10	L04J034373	GCV 40 100
1805 E Overland #3812	C	10	L04J034374	GCV 40 100
1805 E Overland #3823	C	10	K04J017691	GCV 40 100
1805 E Overland #3824	C	10	K04J017767	GCV 40 100

1805 E Overland #3911	B	34	K04J017863	GCV 40 100
1805 E Overland #3912	B	13	K04J017861	GCV 40 100
1805 E Overland #3923	B	8/3/11	RHLN0711Z05228	22V50F1
1805 E Overland #3924	B	17/10	EA10026857	MI40T6FBN

1805 E Overland #4011	C	11	K07J017668	GCV 40 100
1805 E Overland #4012	C	11	K04J017742	GCV 40 100
1805 E Overland #4023	C	32	K04J017652	GCV 40 100
1805 E Overland #4024	C	15	K04J017741	GCV 40 100

1805 E Overland #4111	A	35	Cannot Read	
1805 E Overland #4112	A	8/1	K04J017837	GCV 40 100
1805 E Overland #4123	A	8/3/11	RHLN0311Z10672	22V50F1
1805 E Overland #4124	A	18	K04J017842	GCV 40 100

1805 E Overland #4211	C	8/3/11	RHLN0311Z10583	22V50F1
1805 E Overland #4212	C	958	K04J017755	GCV 40 100
1805 E Overland #4223	C	50	ED10498132	MI40T6FBN
1805 E Overland #4224	C	11/18/11		

1805 E Overland #4311	B	26	K04J017751	GCV 40 100
1805 E Overland #4312	B	22	K04J017600	GCV 40 100
1805 E Overland #4323	B	11/18/11	RHLN0811Z07745	22V50F1
1805 E Overland #4324	B	831	GELN0307V03573	6640T06AV601

1805 E Overland #4411	A	8/3/11	RHLN0411Z00169	22V50F1
1805 E Overland #4412	A	8/3/11	RHLN0411Z00159	22V50F1
1805 E Overland #4423	A	37	K04J017735	GCV 40 100
1805 E Overland #4424	A	8/3/11	RHLN0411Z0165	22V50F1

1805 E Overland #4511	A	20	K04J017647	GCV 40 100
1805 E Overland #4512	A	17/5	K04J017705	GCV 40 100
1805 E Overland #4523	A	25	K04J017684	GCV 40 100
1805 E Overland #4524	A	3/7/11	1036J000053	GCV 40 200

1805 E Overland #4611	B	100	K04J017731	GCV 40 100
1805 E Overland #4612	B	15	K04J017856	GCV 40 100
1805 E Overland #4623	B	1/7/11	RHLN1110Z1187	22V50F1
1805 E Overland #4624	B	100	Cannot read	

1805 E Overland #4711	B	24	1010J003264	GCV 40 200
1805 E Overland #4712	B 11	8/3/11	RHLN0311Z10591	22V50F1
1805 E Overland #4723	B	8/3/11	RHLN0411Z00176	22V50F1
1805 E Overland #4724	B	22	K04J017839	GCV 40 100

1805 E Overland #4811	A	31	K04J017702	GCV 40 100
1805 E Overland #4812	A 17	10/5/11	RHLN00711Z06353	22V50F1
1805 E Overland #4823	A 13	8/3/11	RHLN0411Z00150	22V50F1
1805 E Overland #4824	A 26	12/15/11		

1805 E Overland #4911	A	70	K04J017703	GCV 40 100
1805 E Overland #4912	A	new	K04J017736	GCV 40 100
1805 E Overland #4923	A 13	12/13/11		
1805 E Overland #4924	A	28	K04J017671	GCV 40 100

1805 E Overland #5011	B 10	7/22/11	RHLN0511Z09595	22V50F1
1805 E Overland #5012	B	11	EM11341161	MI40T6FBN
1805 E Overland #5023	B	61	GDO400831	GCV 40 100
1805 E Overland #5024	B 0	8/3/11	RHLN0411Z00160	22V50F1

4572 needs
Dryer vent

1805 E Overland #5111	B			
1805 E Overland #5112	B			
1805 E Overland #5123	B			
1805 E Overland #5124	B			

1805 E Overland #5211	B 30	11/21/11		
1805 E Overland #5212	B 6	new	GDO40040846	GCV 40 100
1805 E Overland #5223	B	155	GDO40040845	GCV 40 100
1805 E Overland #5224	B	7	GDO40040649	GCV 40 100

1805 E Overland #5311	C	1	RHLN0411Z05422	22V50F1
1805 E Overland #5312	C	8	J04J049581	GCV 40 100
1805 E Overland #5323	C 15	8/3/11	RHLN00311Z10593	22V50F1
1805 E Overland #5324	C	11	EM12763508	MI40T6FBN

1805 E Overland #5411	C	11/2/11	RHLN0811Z08918	22V50F1
1805 E Overland #5412	C	43	J04J0449642	GCV 40 100
1805 E Overland #5423	C	83	J04J049621	GCV 40 100
1805 E Overland #5424	C	30	J04J049640	GCV 40 100

vent fell off?

1805 E Overland #5511	B 15	8/3/11	RHLN0311Z10589	22V50F1
1805 E Overland #5512	B	11	RHLN0106Z09375	22V50F1
1805 E Overland #5523	B 2	8/3/11	RHLN0311Z10590	22V50F1
1805 E Overland #5524	B	20	GDB40044103	GCV 40 100

1805 E Overland #5611	C	41	K04J017752	GCV 40 100
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1805 E Overland #5612	C	22	K04J017667	GCV 40 100
1805 E Overland #5623	C	42	K04J017743	GCV 40 100
1805 E Overland #5624	C	7	K04J017605	GCV 40 100

1805 E Overland #5711	C	1/10/12		
1805 E Overland #5712	C	115		
1805 E Overland #5723	C 11	9/18/10		
1805 E Overland #5724	C	12/14/11		



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, et al.,)	
Plaintiffs,)	
vs.)	Case No. CV-PI-2013-04325
SAGECREST MULTI FAMILY PROPERTY)	
OWNERS' ASSOCIATION, INC., et al.,)	
Defendants.)	
_____)	

DEPOSITION OF ADRA KIPPER

OCTOBER 24, 2013

REPORTED BY:

ANDREA L. CHECK, CSR No. 748, RPR

Notary Public

1 A. I'm not aware of that.

2 Q. He's the owner of the building.

3 Did you ever talk with the owner of the
4 building?

5 A. No.

6 Q. Did you ever email him or write to him?

7 A. Nope.

8 Q. Your sole dealings with regard to maintenance
9 at that apartment was through First Rate?

10 A. Correct. Through the manager. The apartment
11 manager, Tara -- I don't know her last name, Tara
12 something.

13 Q. And when you moved in, you had the -- I
14 understand there's two bedrooms in this apartment; is
15 that correct?

16 A. Uh-huh.

17 Q. That was a "yes"?

18 A. Yes.

19 Q. And I guess one would be considered the master
20 bedroom, the bigger one, and the other one was just a
21 bedroom off --

22 A. Right.

23 Q. -- the hall?

24 You had the master bedroom?

25 A. Correct.

1 Q. And when the maintenance person came into your
2 apartment, were you there?

3 A. No.

4 Q. So they came and replaced the thermostat?

5 A. Correct.

6 MR. ANDERSON: Form.

7 Q. (BY MR. HAMAN) As far as you know, they
8 replaced the thermostat?

9 A. It was new when I came back.

10 Q. Was there any paperwork left behind?

11 A. I don't know for sure, but probably.

12 Q. How do you know First Rate did it?

13 A. I don't know for sure.

14 Q. All you know is you contacted someone from
15 First Rate; do you know who?

16 A. Tara. That's who I always communicated with.

17 Q. And did Tara tell you that it would be taken
18 care of?

19 A. Yes.

20 Q. And then a couple of days later you have a new
21 thermostat?

22 A. Right.

23 Q. When you entered your apartment and noticed
24 the new thermostat, could you tell if someone did any
25 other work in the apartment during the same time the

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, et al.,)	
Plaintiffs,)	
vs.)	Case No. CV-PI-2013-04325
SAGECREST MULTI FAMILY PROPERTY)	
OWNERS' ASSOCIATION, INC., et al.,)	
Defendants.)	
_____)

DEPOSITION OF ADRA KIPPER
VOLUME II (Pages 113 - 276)

OCTOBER 25, 2013

REPORTED BY:
ANDREA L. CHECK, CSR No. 748, RPR
Notary Public

1 home?

2 A. Uh-huh. Yeah.

3 Q. So she was out of the house, pretty much, all
4 of the time you were, or would she come home sometimes
5 ahead of you?

6 A. Nope. She was -- she rides horses, so she
7 spends her afternoons at the place where we keep our
8 horse.

9 Q. Did you ever see any of your neighbors, as you
10 came and went, after receiving this notice marked as
11 Exhibit 14?

12 A. Did I ever see them?

13 Q. Sure. On the stairs or outside or anything
14 like that?

15 A. Sure.

16 Q. Did you ask any of them if they had had their
17 water heaters replaced?

18 A. No.

19 Q. Did you ask them anything about the CO
20 detectors they had been given?

21 A. No.

22 Q. Did you ask them anything about whether they
23 were concerned about the notice?

24 A. No.

25 Q. In addition to First Rate, did you understand

1 that there was a property owners' association called
2 Sagecrest POA?

3 A. I didn't understand the relationship until
4 Eric explained it to me.

5 Q. When did he explain that to you?

6 A. Maybe yesterday.

7 Q. What did he explain?

8 A. That the fourplex that I stayed in is owned by
9 an investor that is part of the property owners'
10 association.

11 Q. Did you ever have any reason to seek out
12 anybody connected with the property owners' association?

13 A. No, not that I'm aware of.

14 Q. Did you ever attempt to contact the investor
15 who owned the building you were renting an apartment in
16 to inquire about any part of the notice that you've been
17 given and marked as Exhibit 14?

18 A. No. Again, I trusted that the water heater
19 was going to be replaced, and it was not alarming to me.
20 This message was -- there was no way of me knowing that
21 this was -- there was a deadly concern or any kind of
22 situation that would make me feel unsafe.

23 Q. Now, when Breanna stayed the night, I
24 understand that she would stay in your bed --

25 A. Yes.

1 questions for you.

2 EXAMINATION

3 QUESTIONS BY MR. STACEY:

4 Q. You said you don't know anyone on the board
5 for the property owners' association?

6 A. I do not.

7 Q. Have you ever heard of Jon Kalsbeek?

8 A. No.

9 Q. Jay Arla?

10 A. No.

11 Q. Dave Meisner?

12 A. Nope.

13 Q. Chris Schwab?

14 A. Nope.

15 Q. So it's fair to say you haven't had any
16 communication with them?

17 A. No -- I mean, that's fair.

18 Q. Did Sagecrest ever have tenant meetings where
19 you could go voice your concerns or they could tell you
20 about any issues?

21 A. Not that I'm aware of.

22 Q. Did you ever call Tara about any issues
23 outside of your unit?

24 Any issues with the sidewalk, the grass --

25 A. No.

NO 10:25 FILED
A.M. P.M.

MAR 06 2015

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS
DEPUTY

Michael L. Haman
HAMAN LAW OFFICE, P.C.
923 North 3rd Street
P.O. Box 2155
Coeur d'Alene, ID 83816-2155
Telephone: (208) 667-6287
Facsimile: (208) 676-1683
ISB # 4784

Attorneys for Defendants Matthew E. Switzer, Trustee
And Matthew E. Switzer as Trustee and Individually

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, et. al.,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., et. al.,

Defendants.

Case No. CV-PI-2013-04325

AFFIDAVIT OF MICHAEL L.
HAMAN


STATE OF IDAHO)
)
County of Kootenai) ss.

Michael L. Haman, having been first duly sworn upon oath, deposes and says:

1. I am counsel of record for Defendant Switzer in the above referenced matter, and I make this affidavit of my own personal knowledge.
2. Attached hereto as Exhibit "A" is a true and correct copy of the POA Agreement.
3. Attached hereto as Exhibit "B" are true and correct copies of pages 236, 320 and 334 of the deposition of Tony Drost.

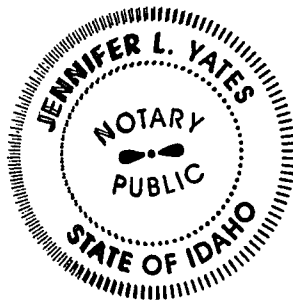
Further your Affiant saith not.

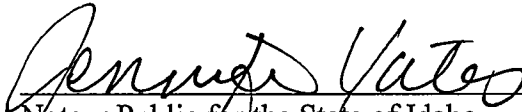
Dated this 2 day of March, 2015.



Michael L. Haman

Subscribed and sworn to before me this 2 day of March, 2015.





Notary Public for the State of Idaho
Residing at Coeur d'Alene
Commission expires 3-16-21

CERTIFICATE OF SERVING

I HEREBY CERTIFY that on this 2 day of March, 2015, I served a true and correct copy of the foregoing AFFIDAVIT OF MICHAEL L. HAMAN by the method described below to:

Eric Clark, Esq.
Clark & Associates
PO Box 2504
Eagle, ID 83616
Fax: 208-939-7136
Attorneys for Plaintiffs

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The Spence Law Firm
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Attorney for Defendants Kalsbek, Arla
Schwab & Meisner

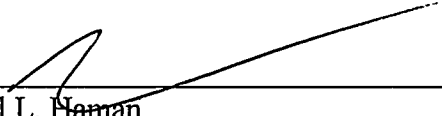
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☐ Hand Delivery



Michael L. Haman



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Check us out on the web at: www.frpmrentals.com

POA AGREEMENT

1.0 AGREEMENT

This AGREEMENT, made and entered into this 15th day of March 2010, between First Rate Property Management, Inc. hereafter referred to as "AGENT", and Sagecrest POA hereafter referred to as "ASSOCIATION".

2.0 CONSIDERATION

IN CONSIDERATION of the mutual promises, covenants and conditions herein contained, ASSOCIATION and AGENT hereby agree as follows:

- 2.1 **Appointment:** ASSOCIATION hereby appoints AGENT as the exclusive Managing Agent of the ASSOCIATION with respect to the property commonly known as Sagecrest POA.
- 2.2 **Term of Agreement:** The term of this AGREEMENT shall be for twelve (12) months, commencing on March 15th, 2010.
- 2.3 **Renewal:** Not less than thirty (30) days prior to the ending date of this AGREEMENT, the parties will confirm their intent to renew and make every reasonable attempt to agree to terms and conditions upon which the contract will be renewed.
- 2.4 **Early Termination:** Either party may terminate this AGREEMENT prior to expiration of its term in event the other party shall fail or refuse to perform its material obligations hereunder, provided, however, that except in cases of failure to pay any money due to the other party, or failure to honestly account for and remit money belonging to the ASSOCIATION, the terminating party shall give written notice to termination at least sixty (60) days prior to the effective date of the termination.
- 2.5 **Consequences of Termination:** In event of termination of this AGREEMENT by expiration of its term, or non-renewal, or otherwise, each party shall account to the other for all matters outstanding as of the effective date of termination. AGENT shall, no later than the effective date of termination, return to ASSOCIATION all of ASSOCIATION's books and records in AGENT's possession at the time of termination, but AGENT shall be entitled to make and retain copies thereof to the extent reasonable required for AGENT'S tax, accounting, and legal purposes.

3.0 DUTIES OF AGENT

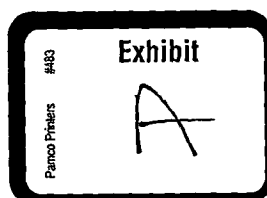
- 3.1 Receive maintenance requests and complaints relating to the property, and in a timely and efficient manner, inform the appropriate contractors (which shall be selected by ASSOCIATION) or ASSOCIATION employees or Board of Directors of the necessity of corrective action.
- 3.2 Assist the ASSOCIATION in enforcement of its rules and regulations by preparing and transmitting notifications of violations to owners and tenants as requested by the ASSOCIATION.
- 3.3 Promptly notify the ASSOCIATION in the event any matter comes to the attention of AGENT relating to the condition of the Property or any violation of ASSOCIATION rules and regulations, which requires the attention of the ASSOCIATION.

Last Revised: 03.12.10

FRPM HOA MANAGEMENT AGREEMENT

Association Initials DZ

Page 1



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- 3.4 Take such action as AGENT deems reasonable and appropriate in the event of any emergency brought to AGENT's attention which may result in damage to the Property or cause injury to tenants and occupants of the Property. Notwithstanding this authority, it is understood and agreed that AGENT will if at all possible, confer immediately with the President or other authorized officer of the ASSOCIATION regarding all emergency repairs in excess of \$300.00 without first obtaining approval of the ASSOCIATION.
- 3.5 Provide correspondence and telephone services for all routine business matters involving the management of the Property.
- 3.6 Assist ASSOCIATION with respect to insurance matters and in the placement of insurance, as and when requested by ASSOCIATION. ASSOCIATION shall cause AGENT to be named as an additional insured party upon all policies of liability insurance maintained by ASSOCIATION.
- 3.7 To pay any taxes and improvement assessments as directed by the ASSOCIATION.
- 3.8 Coordinate annual landscaping and seasonal lawn maintenance.
- 3.9 Assist the ASSOCIATION as needed by preparing monthly and other reports as requested to include but not limited to: vacancy, income and expense, budget, and future projects, as needed to keep the board members informed on the status of the complex.
- 3.10 Prepare and mail a statement to each ASSOCIATION owner, on a scheduled basis approved by ASSOCIATION, reflecting amounts due from each such owner for dues, assessments, or other payments due to ASSOCIATION.
- 3.11 Collect and deposit in ASSOCIATION's operating account, all dues, assessments, and other payments due from ASSOCIATION's owners and other sources.
- 3.12 Receive and review all bills for operating expenses incurred by the ASSOCIATION, and draw checks upon the ASSOCIATION's operating account in payment for such expenses. AGENT shall pay no bill without the prior approval of ASSOCIATION except for routine operating expenses reflected in ASSOCIATION's approved budgets. For purposes of implementing the provisions of this subparagraph, ASSOCIATION shall cause AGENT's designated representative or representatives to be added as authorized signatures for withdrawal of funds from ASSOCIATION's operating account. It shall be the responsibility of ASSOCIATION to assure that adequate funds are maintained on deposit in such account for the payment of ASSOCIATION's bills.
- 3.13 Maintain detailed and proper books of account reflecting all receipts and disbursements, in accordance with generally accepted accounting principles. Such books and records shall be open to inspection by ASSOCIATION's authorized representative at any time with reasonable notice.
- 3.14 Prepare an itemized statement of cash receipts and disbursements ("cash flow") and submit the same to the ASSOCIATION within twenty (20) days after the close of each calendar month, reflecting all transactions during such calendar month. AGENT shall also include with such monthly statements an appropriate statement reflecting the status of all past due and delinquent owner accounts.
- 3.15 Prepare and mail written notifications to ASSOCIATION owners who are past due in payment of any amounts owing to ASSOCIATION. Such notifications shall be sent at least monthly to each owner who is thirty (30) days or more in arrears in payments.
- 3.16 AGENT will pursue collection of all delinquent accounts on a monthly basis in accordance with policies established by the ASSOCIATION Board of Directors. The ASSOCIATION understands that the AGENT is not a collection agency and that the AGENT cannot practice law by representing them in Small Claims or any other court.
- 3.17 AGENT shall promptly file proper releases of Claims of Lien upon receipt of payment of the delinquent payments by reason of which such liens were filed.
- 3.18 AGENT shall, upon request from any owner or purchaser of a unit in the Property, or such party's mortgage lender, or title insurance company authorized by any of the same, furnish a written statement evidencing the status of payment of dues, assessments, or other charges relating to such owner or purchaser's unit.

Last Revised: 03.12.10

FRPM HOA MANAGEMENT AGREEMENT

Association Initials 

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4.0**ADDITIONAL SERVICES BY AGENT:**

- 4.1 AGENT shall attend Board Meetings and the Annual Meeting as required of the ASSOCIATION's Board of Directors each year.
- 4.2 AGENT shall furnish a copy of ASSOCIATION by-laws or other documents to new or other owners, as requested by the ASSOCIATION.
- 4.3 AGENT will prepare and mail out the notice and proxies for the annual and any special meetings, as well as the meeting minutes of the Association. Costs for copying, envelopes, and postage shall be charged back to the ASSOCIATION at the actual rate paid.
- 4.4 A representative of the AGENT will attend local annual meetings of the ASSOCIATION and local meetings of the ASSOCIATION Board of Directors to provide information, answer questions, give advice, and obtain instructions.
- 4.5 AGENT will provide clerical and secretarial support as required to accomplish all services listed herein.

5.0**DUTIES OF ASSOCIATION**

- 5.1 Resident managers and/or on-site managers who work on the business and affairs of the ASSOCIATION shall be employees of Agent. However, it is understood that the fully burdened costs of the Agent's on-site employees who are fully assigned to the ASSOCIATION's premises and fully dedicated to the ASSOCIATION's business shall be reimbursed by the ASSOCIATION. Presently, on-site staff consists of two part-time employees working thirty hours (30) each per week. Agent agrees to comply with all local, State and Federal laws in employing employees and agrees to hold harmless and defend the ASSOCIATION from any and all claims arising by reason of employment of any employee of AGENT. The ASSOCIATION reserves the right to approve the AGENT's assignment of on-site staff.
- 5.2 ASSOCIATION shall maintain at ASSOCIATION's expense all utility services to include: electricity, gas, water, sewer, trash, telephone, fax, and high speed internet.

6.0**COMPENSATION TO AGENT**

- 6.1 ASSOCIATION agrees to pay to AGENT, in advance, on the first day of each calendar month, the sum of \$150.00 as AGENT's monthly management fee.
- 6.2 AGENT shall be responsible for payment of all compensation of AGENT's officers and office employees; however, the following expenses are to be borne by ASSOCIATION and are not included in AGENT's management fees:
 - 6.2.1 Postage, courier and communication service charges incurred in connection with correspondence, including but not limited to conference call charges and any other special billing.
 - 6.2.2 Recording fees in connection with the recording of any Claim of Lien or release thereof.
 - 6.2.3 Photocopying charges, at a rate of \$0.08 per copy.
 - 6.2.4 Expenses for labor and materials incurred in the repair, maintenance, and operation of the Property.
 - 6.2.5 Advertising costs, not to exceed \$500 per month or as otherwise directed in writing by ASSOCIATION.
 - 6.2.6 Resident Manager and/or Onsite Manager insurance, payroll taxes, employee benefits, and base salaries as dictated by the ASSOCIATION. Presently the ASSOCIATION employs two onsite personnel.

7.0**AUTHORITY OF PARTIES**

- 7.1 ASSOCIATION hereby grants to AGENT the authority and power to perform such acts and deeds, and to incur such costs and expenses, all on behalf of and as agent for the ASSOCIATION, as shall be reasonable and necessarily required to carry out AGENT's duties and responsibilities hereunder.

Association Initials *R*

Last Revised: 03.12.10

FROM: HOA MANAGEMENT AGREEMENT

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000904

- 7.2 Unless written notice to the contrary is hereafter given by the ASSOCIATION Board of Directors, the President of the ASSOCIATION is hereby designated as the authorized representative of ASSOCIATION to give and receive notices, approvals, and instructions hereunder. In case of the unavailability of the President, in emergency circumstances, AGENT must communicate with any member of ASSOCIATION's Board of Directors and may rely upon approvals and instructions from such members of the Board of Directors.

8.0 WORKER'S COMPENSATION INSURANCE

- 8.1 AGENT shall maintain in force any workers compensation insurance required by law, covering all employees of AGENT who shall at any time be present on the Property.
- 8.2 ASSOCIATION shall maintain in force workers compensation insurance required by law, covering any employees of ASSOCIATION which shall at any time be in or upon the Property. ASSOCIATION shall require all contractors of ASSOCIATION to provide proof of workers compensation insurance, liability insurance and a contractor's license to AGENT prior to ASSOCIATION entering into any contract for services in or upon the Property.

9.0 NOTICES

All notices, requests, demands, instructions, or other communications to be given to any party hereunder shall be in writing. Any such writing shall be deemed to have been given when deposited in the US Postal Service, postage fully prepaid, by registered or certified mail, addressed to the addressee at the last known address of such addressee.

10.0 ENTIRE AGREEMENT

This AGREEMENT contains the entire agreement between the parties hereto, and supersedes all prior negotiations and agreements, whether written or oral. No modifications or amendments hereto shall be of any force or effect unless in writing and executed by both AGENT and ASSOCIATION.

11.0 LEGAL FEES

- 11.1 ASSOCIATION agrees to pay all expenses incurred by AGENT including, without limitation, attorney's fees for counsel employed to represent AGENT or ASSOCIATION in any proceeding or suit involving an alleged violation by the AGENT or ASSOCIATION, or both, of any constitutional provision, statute, ordinance, law or regulation of any governmental body pertaining to fair employment, Federal Fair Housing, including, without limitation, those prohibiting or making illegal discrimination on the basis of race, creed, color, religion, or national origin, marital status, or mental or physical handicap in the sale, rental or other disposition or housing or any services rendered in connection therewith, but nothing herein contained shall require the AGENT to employ counsel to represent the ASSOCIATION or himself in any such proceeding or suit. (Idaho Code, Sections 12-120 and 12-121)
- 11.2 ASSOCIATION shall not hold AGENT liable for any error of judgment or mistake of law except in cases of willful misconduct or gross negligence.
- 11.3 If any legal action or proceeding be brought by either party to enforce any part of this AGREEMENT, the prevailing party shall recover in addition to all other relief, reasonable attorney's fees and costs, but not to exceed \$750 (seven hundred fifty dollars). (Idaho Code, Sections 12-120 and 12-121)

12.0 BINDING EFFECT

- 12.1 The provisions of this AGREEMENT shall inure to the benefit of, and shall be binding upon, the heirs, personal representatives, successors and assigns of all parties hereto. AGENT may assign its rights and duties hereunder only upon the prior written consent of ASSOCIATION.
- 12.2 Should any Section or any part of any Section of this AGREEMENT be rendered void, invalid, or enforceable by any reason by any court of law exercising competent jurisdiction, such a determination shall not render void, invalid, or unenforceable any other Section or any part of any Section in this

Last Revised: 03.12.10

FRPM HOA MANAGEMENT AGREEMENT

Association Initials

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000905

AGREEMENT.

IN WITNESS WHEREOF, the parties hereby have affixed or caused to be affixed their respective signatures this day of March 12th, 2010.

AGENT

Elizabeth Loop
Elizabeth Loop, General Manager
First Rate Property Management, Inc.

ASSOCIATION

[Signature]
Signature of Association President Jon Kalsbeek

1805 E. Overland Road
Street Address

Meridian, ID 83642
City, State, & Zip

Cell: 925.228.7000 Work: 925.372.9005
Phone Numbers

SagecrestPOA@yahoo.com
Association Email address

81-0668369
Association Tax ID

Vice-President Jay Arla 208-284-1330
Emergency Contact Name and Phone Number

Association Initials JS

Last Revised: 03.02.10

FRPM HOA MANAGEMENT AGREEMENT

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FR06283

000906

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as
the natural parents of
PRIVATE FIRST CLASS McQUEN C.
FORBUSH, USMC (Deceased),
and BREANNA HALOWELL,

Plaintiffs,

vs.

Case No. CV PI 1304325

SAGECREST MULTIFAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an
Idaho non-profit corporation,
d/b/a SAGECREST MULTIFAMILY
PROPERTY OWNERS' ASSOCIATION,
et al.,

Defendants.

DEPOSITION OF TONY DROST

April 1 and 2, 2014

Boise, Idaho

Reported by:

Andrea J. Wecker, CSR #716, RMR, CRR, CBC

<p>1 Okay.</p> <p>2 Q. I think you were asked this question.</p> <p>3 That's why I was pausing. If you were, I really</p> <p>4 apologize.</p> <p>5 But on 2.1, I think you were asked --</p> <p>6 "Sagecrest POA," do you see where that</p> <p>7 is? It's underlined.</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And if you didn't fill in the</p> <p>10 document, I think this is where you had</p> <p>11 indicated --</p> <p>12 Can you tell me as you sit here today</p> <p>13 what "Sagecrest POA" refers to in the context of</p> <p>14 2.1?</p> <p>15 A. I interpret that as Sagecrest --</p> <p>16 MR. ANDERSON: Object to the form.</p> <p>17 Go ahead.</p> <p>18 THE WITNESS: -- Sagecrest Property Owners'</p> <p>19 Association.</p> <p>20 Q. (BY MR. HOWELL) Okay. And is it your</p> <p>21 understanding that Sagecrest Property Owners'</p> <p>22 Association would be different than the property</p> <p>23 that would be subject to First Rate's contract with</p> <p>24 the individual owners?</p> <p>25 MR. ANDERSON: Form.</p> <p style="text-align: right;">[Page 233]</p>	<p>1 THE WITNESS: I believe the intent was to</p> <p>2 only discuss or only include common areas and</p> <p>3 things outside buildings.</p> <p>4 Q. (BY MR. HOWELL) Okay. Now, you made a</p> <p>5 statement -- I said I'd follow up with you -- that</p> <p>6 as time went on, this changed.</p> <p>7 Is that kind of what you said?</p> <p>8 A. Yes, sir.</p> <p>9 Q. And what do you mean by that?</p> <p>10 A. Over -- over time, you know, Jon</p> <p>11 inserted himself in -- needing to be involved. The</p> <p>12 staff was reprimanded.</p> <p>13 You know, I -- I think when you saw the</p> <p>14 initial letter that went out to the owners, they</p> <p>15 were reprimanded for not running their letter</p> <p>16 through him first.</p> <p>17 That was -- that became more and more</p> <p>18 prevalent.</p> <p>19 Q. Was this contract ever amended while</p> <p>20 First Rate managed the POA?</p> <p>21 MR. ANDERSON: Object to the form; calls for</p> <p>22 a legal conclusion with respect to their --</p> <p>23 MR. HOWELL: You can object to the form. I</p> <p>24 understand.</p> <p>25 MR. ANDERSON: Okay.</p> <p style="text-align: right;">[Page 235]</p>
<p>1 Go ahead.</p> <p>2 THE WITNESS: Yeah, if you could rephrase</p> <p>3 that. I don't know if I followed.</p> <p>4 Q. (BY MR. HOWELL) Sure.</p> <p>5 What is your understanding as to what</p> <p>6 "Sagecrest POA" means with respect to the property?</p> <p>7 I mean --</p> <p>8 And let me ask it this way: Do you</p> <p>9 think that includes every apartment complex or</p> <p>10 building on the property?</p> <p>11 MR. ANDERSON: Form.</p> <p>12 THE WITNESS: Well, contrary to what is in</p> <p>13 here, it became important to involve the POA if it</p> <p>14 was a situation that was considered global.</p> <p>15 Q. (BY MR. HOWELL) Okay. And I'll ask you</p> <p>16 about that in just a second, but I'm just looking</p> <p>17 at Exhibit 105 right now, okay?</p> <p>18 A. Uh-huh.</p> <p>19 Q. As this contract is written, did or does</p> <p>20 the property commonly known as Sagecrest POA, does</p> <p>21 that include the insides of each of the apartments</p> <p>22 that make up Sagecrest?</p> <p>23 MR. ANDERSON: Object to the form of the</p> <p>24 question.</p> <p>25 MR. HAMAN: Join.</p> <p style="text-align: right;">[Page 234]</p>	<p>1 THE WITNESS: I think there's plenty of</p> <p>2 e-mails here that suggest that it was.</p> <p>3 Q. (BY MR. HOWELL) Okay. Was there ever a</p> <p>4 formal amendment to this contract?</p> <p>5 A. Not that I'm aware of.</p> <p>6 MR. ANDERSON: Object to the form; calls for</p> <p>7 a legal conclusion.</p> <p>8 Q. (BY MR. HOWELL) All right. What</p> <p>9 specifically within this agreement has been</p> <p>10 modified, based upon your last statement?</p> <p>11 Tell me, can you point where in this</p> <p>12 contract you believe something has been modified or</p> <p>13 amended?</p> <p>14 MR. ANDERSON: Read the whole thing.</p> <p>15 THE WITNESS: Okay.</p> <p>16 Q. (BY MR. HOWELL) Okay. Go ahead.</p> <p>17 A. 3.4.</p> <p>18 Q. What about 3.4?</p> <p>19 A. It states, "Take such action as agent</p> <p>20 deems reasonable and appropriate in the event of</p> <p>21 any emergency brought to agent's attention."</p> <p>22 We were to bring those to Jon's</p> <p>23 attention immediately before acting, especially if</p> <p>24 it was a high-dollar, global problem.</p> <p>25 Q. Okay. What else?</p> <p style="text-align: right;">[Page 236]</p>

<p>1 Q. Because it's putting you on notice of 2 something? 3 A. Yes, sir. 4 Q. Did you know Mr. Kalsbeek prior to 5 February/March 2010? 6 A. Not that I'm aware. 7 Q. Did anyone, including Mr. Kalsbeek, ever 8 tell you why H&H was terminated? 9 MR. GRAHAM: Objection; assumes facts. 10 THE WITNESS: I believe there was an 11 explanation given, but I don't recall what it was. 12 Q. (BY MR. HAMAN) Okay. I'm going to have 13 you turn to Plaintiff's Exhibit 105. 14 MR. ANDERSON: Date? 15 MR. HAMAN: That's the contract with the POA 16 dated March 12th, 2010. 17 MR. ANDERSON: I've got it. Thank you. 18 Q. (BY MR. HAMAN) With regard to 19 paragraph 3.3 on the first page -- 20 A. Yes, sir. 21 Q. -- do you believe that First Rate fully 22 complied with the obligations imposed upon 23 First Rate as set forth in that paragraph with 24 regard to Sagecrest? 25 A. Yes, sir.</p> <p style="text-align: right;">[Page 317]</p>	<p>1 have said that it's changed in your mind. 2 What I'm thinking you're saying is that 3 Mr. Kalsbeek changed the terms of this by telling 4 you and First Rate that, "When it comes to water 5 heaters, I'm taking over." 6 Is that fair? 7 A. Yes, sir. 8 Q. So that's how -- one of the ways it 9 changed? 10 A. Yes, sir. 11 Q. Okay. The same with carbon monoxide 12 detectors and their installation or lack thereof? 13 A. Yes, sir. 14 Q. Because those were global issues, 15 correct? 16 A. Yes, sir. 17 Q. I mean, you made it clear yesterday if 18 it's a dishwasher in 4611 and that's it, Kalsbeek 19 is not going to really get involved in that. 20 You're going to talk to the tenant and figure out 21 what the problem is, and if it's a -- if it's a 22 certain cost, you may or may not inform the owner 23 and you'll fix it? 24 A. Yes, sir. 25 Q. But if it's a global issue and every</p> <p style="text-align: right;">[Page 319]</p>
<p>1 Q. You talked yesterday and then again this 2 morning about the original intent of this contract 3 was to deal with the common areas of the 4 association, among other things, correct? 5 MR. ANDERSON: Speaks for itself, calls for 6 a legal conclusion. 7 MR. HAMAN: I'm asking if that's what he's 8 testified to. 9 THE WITNESS: Yes, sir. 10 Q. (BY MR. HAMAN) But that changed, in 11 your mind, correct? 12 A. It changed. 13 Q. Did it change, in your mind, with regard 14 to management of the situation regarding the water 15 heaters at Sagecrest? 16 A. I can't recall if that was the time of 17 the change, but that was certainly a time of 18 change. 19 Q. Okay. And aside from the time of the 20 change, is that one of the ways in which it changed 21 in your mind? 22 In other words, what I'm getting at, 23 Mr. Drost, is that you have testified that the 24 original intent, among other things, of this 25 contract was to deal with the common areas, but you</p> <p style="text-align: right;">[Page 318]</p>	<p>1 dishwasher is going down in every apartment, then 2 Kalsbeek is going to get involved and he's going to 3 direct what you do, right? 4 A. If there's a trend, yes. 5 Q. So when it comes to global issues, this 6 contract changed such that Jon Kalsbeek directed 7 First Rate's activities? 8 A. Yes, sir. 9 Q. Whether it was a common area or not, 10 correct? 11 A. Yes, sir. 12 Q. Nothing in writing to that effect, is 13 there; in other words, an amendment to this 14 contract? 15 Let me strike that and I'll back up. 16 Is there any written amendments to this 17 contract that you're aware of? 18 A. There are e-mails instructing First Rate 19 Property Management to do certain functions and -- 20 and examples that you've given and others. 21 Q. Okay. And you took those e-mails to 22 mean amendments to this contract? 23 A. We were to perform as instructed. 24 Q. By -- 25 A. Jon Kalsbeek.</p> <p style="text-align: right;">[Page 320]</p>

<p>1 A. I would -- 2 It would be helpful to know specific 3 examples. 4 Q. Okay. Well, let's talk about the 5 testing procedures. 6 A. Okay. 7 Q. That would be one disagreement, correct? 8 A. With -- 9 Q. Tara wanted to test one way; Jon said, 10 "We're going to test it this way." 11 A. Yes, sir. 12 Q. That was a disagreement, correct? 13 A. Yes, sir. 14 Q. And there was apparently a discussion 15 about how -- what was going to happen and what was 16 the result of that? 17 A. I asked Tara if she had explained to Jon 18 the difference. 19 Q. Okay. 20 A. And I recall her responding back that 21 she had and she was doing it Jon's way. 22 Q. Okay. So at least from July of 2011 23 until November of 2012, if there was a 24 disagreement, Jon's decision always prevailed with 25 regard to the health and safety of the tenant in an [Page 333]</p>	<p>1 Q. Can you sit here and think of any case 2 where it didn't prevail with regard to the health 3 and safety of a tenant at Sagecrest following July 4 of 2011? 5 A. Perhaps one. 6 Q. What? 7 A. There was a discussion about why 8 First Rate would hire maintenance people to replace 9 smoke detectors and light bulbs in vaulted 10 ceilings. 11 Q. Do you know approximately a time frame 12 of that issue? 13 A. No, sir. 14 Q. But it was after July of 2011? 15 A. I don't know. 16 Q. Okay. Which units or buildings have 17 vaulted ceilings? 18 A. The upper units. 19 Q. Okay. What did Kalsbeek want to do with 20 regard to the replacement of smoke detectors in 21 vaulted ceilings? 22 A. He just questioned why it wasn't a 23 tenant expense. 24 Q. What did you say? 25 A. Well, he didn't like Tara's response, so [Page 335]</p>
<p>1 emergent situation. 2 Is that correct? 3 A. I -- I don't know. 4 Q. With regard to water heaters, if there 5 was a disagreement, Jon's decision prevailed? 6 A. I don't know. 7 Q. Let me ask you generally -- 8 And I think you have answered this, but 9 I'm going to ask it again. 10 Do you believe Section 3.4 changed in 11 such a way that you did not have to confer with 12 Mr. Kalsbeek if at all possible but were required 13 to go through him with regard to health and safety 14 in emergent situations? 15 A. Yes, sir. 16 Q. Do you believe that Section 3.4 was 17 amended -- whether it's through e-mails, oral 18 communications by Mr. Kalsbeek, written 19 communications by Mr. Kalsbeek -- that if there was 20 a disagreement with regard to health and safety in 21 an emergent situation, that Kalsbeek's decision 22 would override First Rate's recommendations? 23 A. I believe it's safe to say that it 24 prevailed in most cases, but I don't know if it 25 prevailed in all cases. [Page 334]</p>	<p>1 I got involved, and I said, "We do not believe that 2 tenants should be replacing things that require 3 tools and ladders." 4 Q. Okay. 5 A. And, therefore, the tenant will be 6 charged the cost of the light bulb or the battery, 7 and the owner will be charged the cost to have a 8 handyman drive all the way out there, pull out a 9 ladder, and make the replacement. 10 Q. Was that also Tara's request, too? You 11 and Tara -- 12 A. She -- she didn't -- 13 Yes. It was basically the same answer. 14 She just did not provide the explanation I did. 15 Q. Did Jon agree with you? 16 A. He -- 17 No. I believe he disagreed, but, "Go 18 ahead and do what you think is best," or something 19 like that. 20 Q. And so then the cost of the labor was 21 passed on to the owner? 22 A. Yes, sir. 23 Q. And that would have been a cost that's 24 under \$300, in most cases, correct? 25 A. Yes, sir. [Page 336]</p>

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Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, d/b/a SAGECREST MULTI
FAMILY PROPERTY OWNERS'
ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

**DEFENDANT SAGECREST MULTI
FAMILY PROPERTY OWNERS'
ASSOCIATION, INC.'S REPLY TO
PLAINTIFFS' SUPPLEMENTAL BRIEF
RE: DEFENDANT SAGECREST POA'S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiffs based their Response to the POA's SJM as well as their Supplemental Brief largely on deposition testimony of First Rate employees and its owner. However, this testimony does not create a factual dispute regarding the three legal issues presented in the POA's motion for summary judgment; negligence based on actual authority, negligence based upon an assumed duty, and negligence based upon a premises liability theory.

With regard to unit #4624, the POA's creating documents do not grant it any control nor

**DEFENDANT SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC.'S
REPLY TO PLAINTIFFS' SUPPLEMENTAL BRIEF RE: DEFENDANT SAGECREST POA'S
MOTION FOR SUMMARY JUDGMENT - 1**

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did the owner of unit, the Switzer Trust, give the POA any such authority.¹ This is purely a legal issue controlled by the creating documents. Moreover, the POA's lack of authority inside unit #4624 demonstrates that the POA cannot be liable for any act of First Rate.

The First Rate testimony does not present any evidence that the POA actually assumed a duty to the Plaintiffs for any of the allegations in their 4th Amended Complaint because it never undertook, performed, or hired another entity which performed any of the alleged negligent acts. Their testimony cannot demonstrate any reliance by the Plaintiffs or by the tenant, Adra Kipper, for any alleged act by the POA.

First Rate was the property management company hired to manage the interiors of the units for the individual owners as well as the management company hired by the POA in regard to the common areas. First Rate's agreements detail the duties First Rate on behalf of the owners and the POA. These duties were distinct from each other and First Rate was the only entity at the complex which had authority to take act in regard to the interior of unit #4624.

First Rate was inexperienced managing a complex of this nature and size. According to Mr. Drost, this was a "unique" management situation for First Rate at the Sagecrest complex. (*Supplemental Affidavit of Counsel, Michael J. Elia "Supp. Elia Aff." Exhibit 6, p. 199*). This was the largest complex First Rate had ever managed and may have accounted for close to 25% of First Rate's business at the time. (*Id., Ex. 5, p. 69-70*). Moreover, First Rate had never managed a property owner's association prior to the Sagecrest POA. (*Id., Ex. 6, p 200*). Much of First Rate's testimony now is an effort to deflect blame to the POA in an attempt to shield its own conduct, of lack thereof, at Sagecrest.

¹ The Switzer Trust did not give the POA any authority to control the interior of unit #4624.

II. RESPONSE TO PLAINTIFFS' FACTUAL ALLEGATIONS

First Rate was the agent of the Switzer Trust in regard to the interior of unit #4624 and was also the agent of the POA in regard to the common areas of the complex. Although the Plaintiffs failed to acknowledge the bright-line demarcation between the duties of the POA and the duties of the Switzer Trust with regard to building 46, plaintiffs have at least admitted that the Sagecrest POA lacks the power or authority to actually purchase or replace a water heater without an owner's consent due to cost and also admits that the POA did not owe a premises liability-based duty to Plaintiffs to replace the water heater in unit 4624.² (*Plaintiffs' Supplemental Brief, (hereafter "Ps' Supp. Brief") pp. 1, 4*). This concession signifies the bigger picture; the POA did not owe a premise based liability to the Plaintiffs for any condition on the property because they did not have control of the premises.

The POA did not, and could not, take control of the interiors of the units as alleged. The same holds true for single or "global issues" at the complex. The central problem with Mr. Drost's assertion that the POA took control is that First Rate was being compensated to manage the interior of unit #4624, not the POA. Mr. Drost's testimony that First Rate disregarded its agreement with the Switzer Trust because a third party (the POA) instructed him that he was no longer in charge demonstrates First Rate's failure to manage the complex only; it does not create a duty to the Plaintiffs for the POA.

The control of the interior of unit #4624 was known by the POA, as well as First Rate. In an email chain involving Tony Drost and Jon Kalsbeek in August of 2011, Mr. Kalsbeek stated, "the water heaters are interior items of each unit and is therefore an owners' choice on how to handle this situation, not the POA. This makes the cost for inspections and evaluations as owner

² Plaintiffs also admit that this is not a contract case and their claims do not arise via any of the POA's Articles, CCR's, etc. (*Ps' Supp. Brief, p. 2-3, FN3*).

may request, owner responsibility.” (*Stacey Aff.*, 09/09/2014, Ex. 6). Mr. Drost replied, “Everyone understands that. As you have requested, FRPM is keeping the POA informed of any major issues happening within the complex.” (*Id.*)

Despite First Rate testimony that the POA was in charge, when the water heater in unit #4624 tested high for carbon monoxide First Rate contacted the owner of the unit, not the POA. *See, e.g.*, July 29, 2011 email from Sheila Thomason to various owners attached to the *Dec. of Tyson E. Logan in Opp. to Defendants Kalsbeek, Arla, Schwab, and Meisner’s Mot. for Summ. J.*, Ex. 4, FR7100 (“Please let me know which building you own and if I have approval to replace your water heater(s) listed.”); (*Depo. of Liz Loop*, Vol. II, 332:8-14) (decision to replace water heaters was a decision for the owner) (attached to the *Aff. of Robert A. Mills in Support of Def. Drost’s MSJ.*, Ex. S).

Plaintiffs claim that Mr. Kalsbeek told First Rate employees ***“There is absolutely nothing about owners’ approval”*** with regard to hard-wired detector installation, and reaffirmed his protocol that CO detectors would not be installed immediately in all units, but, rather, over time. (*Ps’ Supp. Brief*, p. 6). This issue, like every other issue regarding the interiors of the units is controlled by the Agreement between First Rate and the Switzer Trust. Mr. Kalsbeek was reiterating that First Rate had authority for such actions through the Agreement with the Owners as long as the expense was less than \$250.00. (*Stacey Aff.*, 09/09/2014, Exhibit 4, 9.1; 9.5).

Plaintiffs contend that in March 2012, the POA – through its agent First Rate – notified tenant Adra Kipper that the water heater in unit #4624 had tested at a high level for carbon monoxide and needed to be replaced. (*Ps’ Supp. Brief*, p. 7-8). The facts show, however, only that First Rate sent the notification. This notification sent to multiple owners was drafted and delivered to the units by First Rate employees and contains First Rate’s contact information.

(*Supp. Elia Aff., Exhibit 7, pp. 47, 229-30; Exhibit 8, pp. 132-33*). There is no evidence in the record that remotely indicates that this was done on behalf of, or at the behest of the POA. Further, it stretches the imagination that Ms. Kipper could have relied on the POA for this notification due to the fact that at the time she did not know of the POA's existence. (*Elia Aff., 03/02/2015, Exhibit 4*) (Ms. Kipper stated that she had never spoken with, or even knew of, any of the Board members of the POA, nor did not know that there was a property owner's association until the day before her deposition.)

III. ARGUMENT

A. The POA did not have control of the premises and cannot be liable under a premises liability theory of negligence.

Plaintiff claims that the POA has control of the interior of unit #4624 and is liable under a premises liability theory of negligence. Plaintiffs make this allegation despite conceding that the Sagecrest POA lacks the power or authority to actually purchase or replace a water heater without an owner's consent and that the POA did not owe a premises liability-based duty to Plaintiffs to replace the water heater in unit 4624. (*Ps' Supp. Brief, pp. 4, 10*).

"[T]he general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises in repair." *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 713, 8 P.3d 1254, 1256 (2000). If a party lacks control over a premises, that party is not liable for injuries sustained thereon. *See Johnson v. K-Mart Corp.*, 126 Idaho 316, 317, 882 P.2d 971, 972 ("[A] tenant generally will not be held legally responsible for conditions existing outside the area over which it has possession or control.")

The Plaintiff state that the POA's authority is derived from their CCR's.³ (*Ps' Supp. Brief, p. 3, FN4*). Plaintiff relies on Sections 3.6 & 3.7 claiming that the POA had an easement

³ Defendant agrees with this assertion.

“to go in and do exactly what they did.” (*Ps’ Supp. Brief*, p. 11). It is undisputed that the POA neither owned nor leased the unit in which the injuries occurred. Thus, the Plaintiffs turn to the POA’s Covenants, Conditions, and Restrictions (“CCRs”) to argue that the POA in fact controlled Switzer’s unit. ((*Ps’ Supp. Brief*, 11.) Sec. 3.6 grants the POA an easement to enter onto an owner’s lot and building in order to conduct repairs. Sec 3.6 is wholly silent with regards to, and thus fails to implicate in any form, the interior of a unit. The easement set forth in Sec. 3.6 is made necessary by virtue of Sec. 3.3(A)(1)-(3), which delegates to the POA responsibility for certain exterior aspects of an individual owner’s lot and building, such as sidewalks, landscaping, stairwells, roofs, street lamps, and entry ways. The POA could not fulfill its duties with regards to the exteriors of lots and buildings set forth in Sec. 3.3(A)(1)-(3) absent the easement set forth in Sec. 3.6. Sec. 3.6 grants the POA no control, ownership, or possession with regards to the interior of any Sagecrest unit, and this creates no duty of care on the part of the POA regarding the same.

Similarly, Sec. 3.7 does not demonstrate that the POA could control the interior of unit #4624. Sec. 3.7, titled Restriction on Exterior Construction, instruct that an owner must receive Board permission prior to erecting exterior structures or improvement on the property. When Sections 3.3, 3.5, 3.6, & 3.7 are read in conjunction the POA has authority for exterior issues only.

Lastly, the Plaintiffs cite *McDevitt v. Sportsman’s Warehouse, Inc.*, 151 Idaho 280, 255 P.3d 1166 (2011), for the legal proposition that “even if a party does not own the premises, if it exercises control over the premise upon which an injury occurs, then a duty arises and the controlling party may be liable under a premises liability theory.” (*Ps’ Supp. Brief*, pp. 10-11). The holding of *McDevitt*, however, is that while one does not have to own the premises in order

to be liable this person must control the land. The general rule of premises liability is that one having control of the premises may be liable for failure to keep the premises in repair. *McDevitt*, 151 Idaho at 255 P.3d at 1171.

In *McDevitt*, the Court looked to the CCR's and lease of the tenant and landlord to find that the lessee could not, as a matter of law, control the premises because the governing documents did not give the lessee any authority to control the premises where the plaintiff was injured. Plaintiffs are basically arguing that one can assume a duty to control land under premises liability. However without ownership, in order to have control of land not owned, one must have authority to control the land from the owner. In this situation such authority would have to be given to the POA from the Switzer Trust. The allegations against the POA are not proper under premises liability in negligence.

B. The POA did not assume a duty to the Plaintiffs.

Plaintiffs allege that the POA assumed a duty to replace the water heater in unit #4624 and that the tenant, Adra Kipper, relied on the POA to replace the water heater. (*Ps' Supp. Brief*, p. 12). This allegation directly conflicts with Plaintiffs' concession that the POA lacks the power or authority to actually purchase or replace a water heater and that the POA did not owe a premises liability-based duty to Plaintiffs to replace the water heater in unit 4624. (*Ps' Supp. Brief*, p. 1, 4). Plaintiffs also claim that the POA expressly represented to Adra Kipper that it would replace the water heater, and she relied on the POA's undertaking. There is not a scintilla of evidence for this statement as deposition testimony demonstrates that First Rate, on its own, made the representation to Ms. Kipper that her water heater would be replaced. Nor did Ms. Kipper know of the existence of the POA at the complex. These facts are uncontested.

Plaintiffs cited to *Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 316 P.3d 92 (2013) but have left out the key component of what the *Beers* Court instructed must be present for an assumed duty. Namely, that when a party assumes a duty by voluntarily performing an act that the party had no duty to perform, the duty that arises is limited to the duty actually assumed – which is the scope of the undertaking. 155 Idaho at 688. The POA did not assume a duty to the Plaintiffs for any of the allegations in their 4th Amended Complaint because it never undertook or actually performed any of the alleged negligent acts.

Plaintiff cites to *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 987 P.2d 300 (1999)⁴ for the legal proposition that given the policy underlying the imposition of a tort duty as set forth in *Beers*, such reliance is presumed when a party voluntarily undertakes a safety-related function. (*Ps' Supp. Brief*, p. 12). However, as explained above, the tenant did not know even know of the existence of a POA at the complex or who the member were. Ms. Kipper stated that First Rate was the only entity she ever dealt with in regard to maintenance of her unit. (*Elia Aff.*, 03/02/2015, *Ex. 1*, p 25, p. 54). The evidence demonstrates that Ms. Kipper relied on First Rate for any issue she had inside of unit #4624 and could not have relied on the POA, as a matter of law.

Plaintiff also cites to *Baccus v. Ameripride Services, Inc.*, 145 Idaho 346, 179 P.3d 309 (2008) in support of the proposition that reliance can be presumed without any evidence that plaintiff even knew of the existence of a company called AmeriPride. (*Ps' Supp. Brief*, p. 13). Plaintiffs' reliance on this case is entirely misplaced because the Court stated that Ameripride had been hired by the worker's employer to provide safety mats, and had done so on prior

⁴ The facts of *Coghlan* demonstrate that University employees were supervising the parties where the underage Plaintiff became over-intoxicated. The Court held that there is a question of fact whether the University assumed a duty to supervise Plaintiff. This is consistent with *Beers* in that there was a question of fact whether the University could have assumed a duty for an act it had actually undertaken – supervising the students.

occasions. 145 Idaho at 351-352. Thus, the defendants actually assumed a duty by placing mats in the entry and could potentially be liable for the failure to continue to place mats in the entry because the employees were relying on the safety mats to be in the entry. This case is illustrative of what is missing in the Plaintiffs' allegations against the POA; they are claiming that the POA assumed a duty for acts that it never undertook.

Plaintiffs also cite to *Gagnon v. Western Bldg. Maintenance, Inc.*, 155 Idaho 112, 306 P.3d 197 (2013). This case is instructive as Western Bldg. Maintenance "WBM" was alleged to have neglected to apply ice melt to a bank parking lot (which is arguably a safety-related duty). WBM was, in fact, not authorized to apply the ice melt to the parking lot so it claimed that it could not and did not have a duty to do so, despite applying ice-melt to the bank's sidewalks (also arguably a safety-related duty). *Gagnon* clearly supports that the POA could only be held liable for acts which it actually undertook.

Plaintiffs' assertion that the Restatement (Second) of Torts § 324A supports their position also fails. Under § 324A one must actually undertake to render services to another in order to be subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking. Plaintiffs claim that the POA implemented a false and dangerous response protocol, which prevented others from responding in a safer and more reasonable manner. (*Ps' Supp. Brief*, p. 15).

Plaintiffs set forth the following allegations as evidence that the POA assumed a duty to the Plaintiffs and affirmatively increased the danger in unit #4624:

- a. First Rate suggested hiring a professional plumber to maintain/clean the filters in the water heaters (to decrease the risk that a water heater would clog and fail), yet the POA prevented this fix from being implemented.

- b. First Rate sought to have a handy-man contractor go door-to-door to ensure that each and every apartment unit had a functioning CO detector to warn of a possible CO exposure; but the POA rejected this idea.
- c. Because the POA exerted absolute control over the property manager's operation and management at the property, First Rate did not even seek owner input on issues like this—the POA made the call.

These allegations involve interior issues of the units and, thus, the POA could not authorize First Rate to take any action. Further, as stated by Mr. Kalsbeek and agreed to by Mr. Drost, “the water heaters are interior items of each unit and is therefore an owners’ choice on how to handle this situation, not the POA. This makes the cost for inspections and evaluations as owner may request, owner responsibility.” (*Stacey Aff.*, 09/09/2014, Ex. 6). First Rate was the entity that had authority to implement or take corrective action and failed to do so.

C. The POA is not vicariously liable for First Rate’s act or omissions on the interiors of the units at the complex.

Plaintiffs allege that First Rate acted as the POA’s agent in responding to the CO issue inside unit interiors at Sagecrest. **Because the scope of the agency included First Rate’s activities in unit interiors, the POA is vicariously liable for First Rate’s negligence.** (*Ps’ Supp. Brief*, p. 16) (emphasis original).

Plaintiffs’ theory erroneously assumes that because both the POA and Switzer Trust contracted with First Rate, the duties of the POA and the individual homeowner vis-à-vis unit #4624 or building 46 were co-extensive. First Rate was an agent of both entities but a bright-line demarcation existed between the duties of the POA and the duties of the Switzer Trust with regard to building 46. The POA undisputedly had control over, and was thus responsible for, the common areas. An individual owner undisputedly had control over, and was thus responsible for, the interiors of his own units. Consistently, each party could only give First Rate authority to act on its behalf in regard to the areas of Sagecrest in which it controlled. First Rate had no authority

over and did not try to control any buildings it did not have under contract with a building owner. (See *Aff. of Elia*, 03.02.2015, Ex. 2, (*Deposition of Tara Gaertner*, pp. 150, 266-68, 319-20, 444-45)).

The POA-First Rate agreement does not direct First Rate to act on behalf of the POA in regard to unit interior issues because the POA did not have any authority regarding the interiors. The plain language of the Sagecrest CCRs instruct that the Owners have the exclusive right to the interiors of their units. (*Stacey Aff.* 07/24/2014, Ex. 2, Article 3.3). Consistent with the ownership rights, the owners have the duty to maintain the entire interior of their unit including the appliances, plumbing and plumbing fixtures, electrical system and fixtures, and all components of the heating and air conditioning system. (*Id.*, Article 3.5). The POA's creating documents set forth the POA's authority. The POA could not, and did not, grant authority to First Rate to take any action on the interiors of the units because it did not have the authority to do so. Therefore, Plaintiffs' claim that the POA is vicariously liable for First Rate's acts in regard to unit interior issues fails as a matter of law.

IV. CONCLUSION

Defendant Sagecrest Multi Family Property Owners' Association, Inc. respectfully requests the Court reconsider its previous ruling on Sagecrest's Motion for Summary Judgment, and grant the motion in favor of the POA.

DATED this 9th day of March, 2015.

MOORE & ELIA, LLP

By: 

Michael J. Elia, Attorneys for Defendants
Sagecrest Multi-Family Property Owners'
Association, Inc.

CERTIFICATE OF SERVICE

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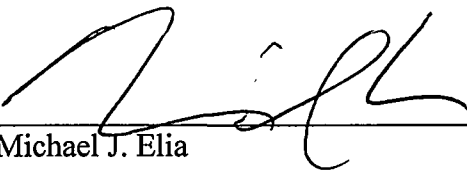
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Attorneys for Defendant Sagecrest Multi-Family Property Owners' Association, Inc.,

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,
vs.

SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC., an Idaho non-profit corporation, d/b/a SAGECREST MULTI FAMILY PROPERTY OWNERS'' ASSOCIATION; et al.,

Defendants:

Case No. CV-PI-13 04325

**SUPPLEMENTAL AFFIDAVIT OF
COUNSEL MICHAEL J. ELIA IN
SUPPORT OF DEFENDANT
SAGECREST MULTI FAMILY
PROPERTY OWNERS' ASSOCIATION,
INC.'S MEMORANDUM IN SUPPORT
OF RECONSIDERATION OF POA'S
MOTION FOR SUMMARY JUDGMENT**

STATE OF IDAHO)
 : ss
County of Ada)

Michael J. Elia, being first duly sworn upon oath deposes and states as follows:

1. I am over 18 years of age and am competent to make this Affidavit.
2. I am one of the attorneys representing Defendant Sagecrest Multi-Family Property Owners' Association in this litigation.
3. Attached hereto as Exhibit 5 are true and correct copies of pages 66-73, 78-81

**SUPPLEMENTAL AFFIDAVIT OF COUNSEL MICHAEL J. ELIA IN SUPPORT OF
DEFENDANT SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC.'S
MEMORANDUM IN, SUPPORT OF RECONSIDERATION OF POA'S MOTION FOR
SUMMARY JUDGMENT - 1**

000924

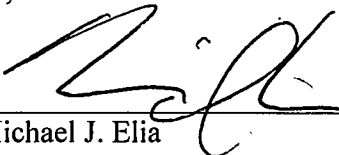
from the deposition of Liz Loop.

4. Attached hereto as Exhibit 6 are true and correct copies of pages 197-200, 289-292 from the deposition of Tony Drost.

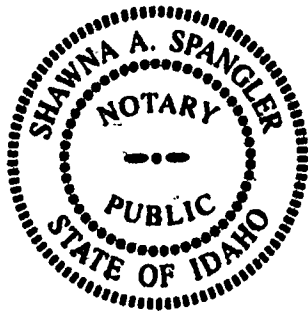
5. Attached hereto as Exhibit 7 are true and correct copies of pages 47-50, 227-230 from the deposition of Sheila Thomason.

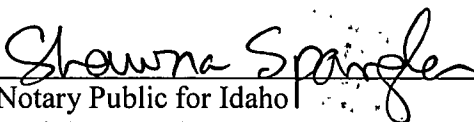
6. Attached hereto as Exhibit 8 are true and correct copies of pages 132-133 from the deposition of Tara Gaertner.

DATED this 9th day of March, 2015.


Michael J. Elia

SUBSCRIBED AND SWORN TO BEFORE me on this 9th day of March, 2015.




Notary Public for Idaho
Residing at Boise, Idaho
My Commission Expires: 2-15-2020

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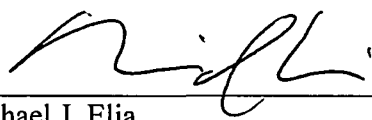
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Michael J. Elia



1 I'm going to take that back because
2 since it had shown up, I believe we had talked
3 about it.

4 Q. Do you remember specifically what was
5 discussed?

6 A. I don't remember specifically.

7 Q. Do you remember the time frame?

8 A. From when it was recognized as a global
9 issue.

10 Q. You said "global issue."

11 Where did you come up with that term?

12 A. I came up with it as it was an issue
13 throughout the complex.

14 Q. Okay. Does First Rate maintain some
15 type of list of global issues?

16 A. It would be in our meeting notes if
17 there was a routine issue so that we could resolve
18 it.

19 Q. So are you telling me that there's --
20 somebody takes notes of these weekly meetings?

21 A. Yes. We have an agenda.

22 Q. And who creates that agenda?

23 A. Tony and myself.

24 Q. Do you recall if carbon monoxide or
25 water heater issues were ever on an agenda?

[Page 66]

1 Q. Do you recall any weekly meeting where
2 there was discussion of installing hardwired CO
3 detectors before November 10th, 2012?

4 A. Not that I recall.

5 Q. Any discussions about the need for
6 maintaining and cleaning the flame arrestor on the
7 A.O. Smith water heaters at Sagecrest?

8 A. During our --

9 Q. Weekly meetings.

10 A. -- weekly staff meetings?

11 No.

12 Q. Were there ever discussions regarding
13 conflicts with Mr. Kalsbeek during these meetings?

14 A. Possibly. It's --

15 The meetings can be vague, and sometimes
16 opinions come out.

17 Q. Do you specifically recall anybody
18 stating an opinion regarding Mr. Kalsbeek?

19 A. Nobody in particular.

20 Q. But my question was: Do you recall
21 anyone making such an opinion?

22 A. Making what kind of opinion?

23 Q. Any type of derogatory opinion regarding
24 Mr. Kalsbeek.

25 A. Yes.

[Page 68]

1 A. I don't recall.

2 Q. Okay. Does First Rate Property
3 Management still maintain their agendas for, say,
4 2011 and 2012?

5 A. Yes.

6 Q. Okay. And who has those?

7 A. They're in the computer.

8 Q. Okay. Do you have any type of meeting
9 minutes that are created after a meeting?

10 A. They are added onto the agenda.

11 Q. Okay. Same situation? They're kept on
12 a computer?

13 A. Yes.

14 Q. Who maintains or keeps those meetings --
15 minutes?

16 A. They are in the computer. Anybody can
17 go back and look at them.

18 Q. No, but who -- at the meeting, who is
19 delegated to keep track of the minutes?

20 A. Usually Tony.

21 Q. Okay.

22 A. Unless Tony is absent, at which point I
23 keep track of that --

24 Q. Okay.

25 A. -- and conduct the meeting.

[Page 67]

1 Q. Can you --

2 A. But I --

3 Q. Can you tell me the facts or
4 circumstances regarding the opinion?

5 A. I can't tell you specifically.

6 Q. And my question was "derogatory," so
7 your response --

8 You believe there were some derogatory
9 statements made.

10 Is that correct?

11 A. Yes.

12 Q. Is that fair?

13 A. Yes.

14 Q. Okay. And as you sit here today, you
15 can't remember who made those derogatory
16 statements?

17 A. No.

18 Q. And you cannot remember the specifics of
19 the derogatory statements.

20 Is that fair?

21 A. Yes, that's fair.

22 Q. Okay. Was the POA a large account for
23 First Rate Property Management?

24 A. Yes.

25 Q. In the grand scheme of things, how large

[Page 69]

1 of an account?

2 A. Is that within all of the properties
3 that we managed at the time or just --
4 That was the largest complex we've ever
5 managed.

6 Q. Okay. Can you give me a general idea as
7 the general manager how much percentage of, say,
8 monthly revenue that Sagecrest brought in to First
9 Rate?

10 A. We charged 5 percent on any rental
11 income.

12 Q. I understand, but what I'm saying is if
13 you throw the -- all of the rentals that First Rate
14 managed in a -- in a pie -- in a pile, what
15 percentage of the income per month came from
16 Sagecrest?

17 Was it 50 percent? Was it 25 percent?
18 A. It was less than 25 percent. I don't
19 know the exact number.

20 Q. But this was -- as your testimony
21 before, this was your largest complex?

22 A. Correct.

23 Q. Okay. Were you managing any other
24 complexes nearly that size?

25 A. No.

[Page 70]

1 Q. Okay. And this was 180 units or
2 something along those lines.

3 Is that correct?

4 MR. ANDERSON: If you know.

5 THE WITNESS: Around.

6 Q. (BY MR. CLARK) Okay. Was there any
7 other units that you managed that were even close
8 to that size?

9 A. No.

10 Q. Were most of them fourplexes and things
11 like that?

12 A. Yes.

13 Q. Okay. If I understand the facts,
14 ultimately, First Rate Property Management
15 terminated their relationship with Sagecrest.

16 Is that correct?

17 A. Yes.

18 Q. Okay. And as you sit here today, can
19 you tell me why, if you -- what your understanding
20 was that prompted the termination, if you know?

21 A. I don't recall exactly.

22 Q. Would you look at Exhibit 120 for me,
23 please.

24 MR. ANDERSON: What's the date?

25 MR. CLARK: It is May 22nd, 2012.

[Page 71]

1 Q. (BY MR. CLARK) In the middle of the
2 page, there's an e-mail from you, I believe. It
3 says, "From: Lizz, Lizz@FirstRaterentals.com, or
4 FRPMrentals.com."

5 Is that you?

6 A. Yes.

7 Q. Okay. The date is 5/22/2012.

8 Is that correct?

9 A. Yes.

10 Q. And there's a subject, "Good morning!
11 Questions???"

12 A. Yes.

13 Q. What were the "good morning" questions?

14 A. It's --

15 There was a whole other e-mail.

16 Q. Okay. It's --

17 A. I don't recall what all the questions
18 were.

19 Q. What prompted the "good morning"
20 questions, if you know?

21 A. I don't know.

22 Q. Who were the "good morning" questions
23 from?

24 A. Mr. Kalsbeek.

25 Q. Okay. And did you personally respond to

[Page 72]

1 those "good morning" questions?

2 A. The ones that I was able to, yes.

3 Q. Who else responded to those "good
4 morning" questions from First Rate Property
5 Management?

6 A. It would depend on what department he
7 was requesting information from. Could be the
8 accounting department, could be --

9 Q. Do you know if Tony Drost responded to
10 any of the "good morning" questions?

11 A. I believe he did get involved and start
12 responding, yes.

13 Q. Do you know if Tara Gaertner responded?

14 A. If -- if there were questions for her
15 that I could not answer.

16 Q. Okay. In the middle of --

17 In your e-mail, you say, "Here was his
18 response to all of mine."

19 Who were you referring to? Who is
20 "his"?

21 A. Mr. Kalsbeek.

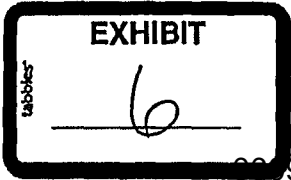
22 Q. And so Mr. Kalsbeek responded to your
23 responses.

24 Is that accurate?

25 A. Yes.

[Page 73]

<p>1 A. First Rate. 2 Q. Would you do it personally? 3 A. I rely on my leasing agents to do this 4 as well. 5 Q. Okay. But you do do it personally? 6 A. Sometimes. 7 Q. How often do you look at CC&Rs? 8 Let's say -- 9 Strike that. 10 How long have you worked for First Rate? 11 A. 12 1/2 years. 12 Q. In your 12 1/2 years, can you estimate 13 how many CC&Rs you've looked at? 14 MR. ANDERSON: Objection; it's vague. 15 THE WITNESS: I -- I couldn't tell you. 16 Q. (BY MR. STACEY) Would you say there's 17 been hundreds? 18 MR. ANDERSON: Well, the question is vague 19 in terms of seeing the document or studying it in 20 some fashion. There's a different degree -- 21 MR. STACEY: Just reviewing the document. 22 MR. ANDERSON: So how many has she reviewed 23 in passing or in detail? The question is still 24 vague. 25 Q. (BY MR. STACEY) As part of your 253</p> <p style="text-align: right;">[Page 78]</p>	<p>1 if I can place a sign in the yard. 2 All -- the CC&Rs are provided to all of 3 our tenants as well so that they are aware of what 4 the rules are. 5 Q. Okay. When you sign an agreement with a 6 property owner -- 7 A. Uh-huh. 8 Q. -- do you look at the CC&Rs to make sure 9 that the contract with them is in line with the 10 CC&Rs? 11 MR. ANDERSON: Form, legal conclusion. 12 Go ahead. 13 THE WITNESS: I do not. 14 Q. (BY MR. STACEY) Okay. Would you turn 15 to <u>Exhibit No. 54</u> and look at the back page of the 16 exhibit. 17 Is that your signature? 18 A. Yes, it is. 19 Q. -- And to the best of your knowledge, is 20 that <u>Matt Switzer's signature</u>? 21 A. Yes. 22 Q. Okay. As part of your position as 23 general manager, do you review these contracts with 24 the owners? 25 A. They are sent to the owners. They -- 255</p> <p style="text-align: right;">[Page 80]</p>
<p>1 position as general manager, how many CC&Rs have 2 you reviewed? 3 MR. ANDERSON: Object to the form. 4 Go ahead and answer. 5 THE WITNESS: Under 100. 6 Q. (BY MR. STACEY) At this point, how many 7 units does First Rate manage? 8 A. I can tell you how many -- about how 9 many doors we manage. We manage about 700 doors. 10 Q. Okay. And has this been the same 700 11 doors for 12 1/2 years? 12 A. No. 13 Q. How much turnover has there been there? 14 A. We've increased in size. 15 Q. Do you manage the same 700 that you 16 started out with? 17 Do you manage the same units that you 18 started out with still to this day? 19 A. No. 20 Q. So when you manage a new property, it's 21 not a normal part of your position to review the 22 CC&Rs? 23 A. I pull the CC&Rs, and they are filed. I 24 do not always go and read through them. There are 25 times when I have to for subdivisions to find out 254</p> <p style="text-align: right;">[Page 79]</p>	<p>1 it's up to them to review and I answer any 2 questions. 3 Q. Do you recall any discussion with Matt 4 Switzer about this contract? 5 A. I do not. 6 Q. Okay. Are you familiar with this 7 contract? 8 A. Yes. It's an old -- older contract than 9 what we have now. 10 Q. Do you know how this document was 11 created? 12 <u>A. We have a template management agreement,</u> 13 <u>and I do believe there were changes made to the</u> 14 <u>agreements with Mr. Kalsbeek.</u> 15 Q. With Mr. Kalsbeek as an owner? 16 A. As when we were taking on the property. 17 Q. Are you talking about -- 18 A. Complex. 19 Q. Okay. 20 A. He reviewed it as an owner and made 21 suggestions of what he wanted, and he wanted 22 them -- as he was looking out for the owners, for 23 all the management agreements. 24 Q. Did he look at this document? Do you 25 know? 256</p> <p style="text-align: right;">[Page 81]</p>



1 took them to them and said, "Are these your
2 procedures?"
3 Q. (BY MR. CLARK) Who did you ask for the
4 procedures? You said "she."
5 A. Well, actually I don't know for sure,
6 but I'm confident I asked Tara since she was
7 working with Jon on those procedures that he
8 created.
9 Q. Okay. Was that --
10 Did you ask for those procedures during
11 your meeting on Sunday with Tara and Lizz?
12 A. No.
13 Q. When did you ask for those testing
14 procedures from Tara?
15 A. I don't know.
16 MR. CLARK: Why don't we take a quick break.
17 I think I'm almost done.
18 MR. ANDERSON: Sure.
19 (Break taken from 3:32 p.m. to 3:45 p.m.)
20 Q. (BY MR. CLARK) Mr. Drost, did you ever
21 have a face-to-face meeting with Ben Davis? A
22 face-to-face meeting with Ben Davis?
23 A. Not that I'm aware of.
24 Q. Did you ever go to Ben Davis' building
25 and participate in water heater training?
197

[Page 197]

1 A. No, sir.
2 Q. Are you aware of any First Rate Property
3 Management employees that did?
4 MR. ANDERSON: Form.
5 THE WITNESS: At the time?
6 Q. (BY MR. CLARK) Well, ever.
7 A. After the fact, I have learned that a
8 couple did.
9 Q. When you say, "After the fact," when did
10 you learn that a couple of your First Rate Property
11 Management employees went to training at Express
12 Plumbing?
13 A. Last year.
14 Q. How did you find out?
15 A. Somebody told me. I don't recall.
16 MR. CLARK: Okay. Thank you very much.
17 That's all I have.
18 MR. ANDERSON: Thanks, Eric.
19 MR. GRAHAM: I'll pass for you. I don't
20 really have much.
21
22 EXAMINATION
23 BY MR. HOWELL:
24 Q. My name is John Howell. I believe we
25 met just prior to your deposition. It seems like a
198

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1 long time ago.
2 I'm going to jump around a little bit.
3 A. Jump around a little bit? Is that
4 something new?
5 Q. I'll just give you a warning, and so if
6 you need clarification as to where I'm going, just
7 let me know.
8 Okay. Going over some of your history,
9 I'm not going to review everything that Mr. Clark
10 asked you on that, but with respect to managing
11 apartment complexes, you indicated that you had a
12 couple of fourplexes that you managed prior to
13 taking the Sagecrest account.
14 Is that right?
15 A. Yes.
16 Q. And did you have other apartment units
17 at all prior to taking the Sagecrest account?
18 A. You know, it depends on how you want to
19 define "apartments." We manage a lot of
20 fourplexes. Sagecrest is unique in that you have
21 individual-owned fourplexes in a community that
22 they want to call an apartment complex.
23 Yes, so it was unique to us. We had
24 managed one other complex that was similar, but we
25 had more -- well, we could go to -- it wasn't this
199

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1 global issue. We could go to, you know, the
2 individual owners and -- like normal.
3 Q. Had you ever managed a POA prior to
4 Sagecrest?
5 A. (Witness indicates.)
6 Q. No?
7 A. No, sir.
8 Q. Okay. Had you ever managed an HOA prior
9 to Sagecrest?
10 A. No, sir.
11 Q. Have you ever managed a POA since?
12 A. No, sir.
13 Q. Okay. Were you involved in the process
14 of gaining Sagecrest as a client other than what
15 you've already talked about?
16 And let me narrow that a little bit.
17 You indicated, to my understanding, that
18 the general manager, Ms. Loop, was primarily in --
19 in charge of that process.
20 Is that fair?
21 A. Yeah. I -- I believe that it was Lizz
22 and Sheila that closed the deal. I --
23 Q. What involvement did you have, if any?
24 A. I had some discussions with Jon.
25 Q. Okay. In what sort of setting? Was it
200

[Page 200]

[56] (Pages 197 to 200)

1 why --
 2 There was an e-mail about, "Why is the
 3 owner paying to have the appliance light bulb
 4 replaced?"
 5 Q. How would Jon become aware of an issue
 6 like that that wasn't in his own unit?
 7 A. Perhaps by the daily log that he had
 8 them complete.
 9 I don't know.
 10 Q. You testified yesterday that in the
 11 contract with the individual owners, there was a
 12 provision in there that required biannual
 13 preventative maintenance?
 14 A. Yes, sir.
 15 Q. And I think your words were that it kind
 16 of flopped.
 17 A. Yes, sir.
 18 Q. Can you explain that a little bit? How
 19 did that flop?
 20 A. That was a -- a general flop, if you
 21 will. Our -- our clients outside of even Sagecrest
 22 did not find any benefit. They saw it as a -- an
 23 added expense.
 24 And so we had reverted to -- or we
 25 changed to annual, and we still got some guff on
 289

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1 that. And so as of today, it's an opt-out program.
 2 Q. Do you know what -- at the Sagecrest
 3 complex what was being done during preventative
 4 maintenance?
 5 A. No. That would be a question for Tara.
 6 Q. Do you know if any of the individual
 7 owners at Sagecrest agreed to not have employee
 8 maintenance done biannually?
 9 A. Again, I'd have to refer to Tara.
 10 Q. Did you inform the POA that you weren't
 11 going to do biannual preventative maintenance?
 12 A. Me personally?
 13 Q. Yes.
 14 A. Not that I recall.
 15 Q. Are you aware that they were informed by
 16 anyone?
 17 A. I -- I wouldn't know.
 18 Q. That's not an issue that you would be on
 19 an e-mail chain about?
 20 A. Only unless somebody was raising a big
 21 stir about it.
 22 Q. In November of 2012 when Tara told you
 23 that she had been doing random testing, did she
 24 tell you how random she was testing?
 25 Was she testing every third, every fifth
 290

[Page 290]

1 unit? Did she tell you any of the details?
 2 A. If she did, I don't recall. The only
 3 key word I -- I recall was "random."
 4 Q. What was your initial thought when you
 5 heard that?
 6 A. That she made a decision without
 7 clearing it through Jon, myself, or a supervisor.
 8 Q. Did you ever inform anyone on the POA
 9 that she was doing random testing?
 10 A. I didn't learn about it until --
 11 Q. After you learned about it.
 12 A. Yes, sir. We were -- were were parting
 13 ways, so I don't believe I did.
 14 Q. I believe you said that Tara also told
 15 you she thought the procedures were fixed to get a
 16 zero reading.
 17 A. Yes, sir.
 18 Q. What did you think about that statement?
 19 A. I was surprised. I had trusted the
 20 information that Jon had given me on how they were
 21 created, and I felt --
 22 Prior to that, I was very confident in
 23 what was being done. And at that moment, which is
 24 why I was getting upset yesterday, was I came to a
 25 conclusion of -- I was just duped.
 291

[Page 291]

1 Q. So do you have any --
 2 Is there any reason that you can think
 3 of that Jon would want to get zero readings?
 4 MR. ANDERSON: Form.
 5 Go ahead and answer, if you can.
 6 THE WITNESS: I don't know what he was
 7 thinking.
 8 Q. (BY MR. STACEY) So you testified that
 9 Jon came in, took over the CO procedures, dictated
 10 basically everything that had to do with the CO
 11 issue.
 12 Is that correct?
 13 A. Yes, sir.
 14 Q. And then he created procedures that will
 15 basically be completely ineffective.
 16 That's your understanding?
 17 A. That was what became my understanding
 18 as -- on that day, yes.
 19 Q. If you thought Jon was doing something
 20 outside of his authority with the POA, could you go
 21 to the POA board?
 22 A. I -- I --
 23 It's kind of a hypothetical. I suppose,
 24 yes.
 25 Q. Well, you managed the -- First Rate
 292

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[79] (Pages 289 to 292)



1 Q. And it's from Tara?
 2 A. Yes.
 3 Q. And it cc's you.
 4 A. Okay.
 5 Q. Do you know why she would still be
 6 courtesy copying you if you didn't work there?
 7 A. No. You'd have to ask Tara.
 8 Q. Okay.
 9 A. I'm guessing an error.
 10 Q. Do you recall ever receiving this
 11 e-mail?
 12 A. No.
 13 Q. You didn't receive any e-mails at
 14 Sheila@FRPMrentals.com after September 12th?
 15 A. No.
 16 Q. I've handed you what has been marked
 17 previously as Exhibit 14.
 18 Would you take a look at that document
 19 for me.
 20 A. Okay.
 21 Q. Have you ever seen this document before?
 22 A. Yes.
 23 Q. Do you know who drafted it?
 24 A. I believe I did.
 25 Q. When did you draft it?

[Page 47]

1 A. I don't recall the date. When I
 2 delivered the carbon monoxide detectors when we
 3 were first informed of the high carbon monoxide
 4 levels in 2011.
 5 Q. July of 2011?
 6 A. Sounds right.
 7 Q. Okay. Who asked you to draft this
 8 document?
 9 A. I did it myself.
 10 Q. Okay. Did you send a copy to Mr. Drost?
 11 A. I don't think so.
 12 Q. Did you --
 13 A. I don't think so.
 14 Q. Did you send a copy to Mr. Kalsbeek?
 15 A. Yes.
 16 Q. How do you know you did that?
 17 A. I believe --
 18 I recall him being upset with the fact
 19 that I did these things without discussing a lot
 20 with him first.
 21 Q. Is this just one instance of that --
 22 A. Of what?
 23 Q. -- situation with Mr. Kalsbeek about him
 24 being critical with you?
 25 A. No. There were several incidents.

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1 I don't recall exact times and dates,
 2 but it was pretty common for him to be upset if
 3 things were done without his knowledge.
 4 Q. Okay.
 5 MR. HOWELL: Objection; move to strike.
 6 Q. (BY MR. CLARK) So did you personally
 7 deliver these notices to the apartments in
 8 September -- or July 2011?
 9 A. Yes.
 10 Q. And --
 11 A. I believe there was a couple of us.
 12 Q. You and who else?
 13 A. I believe myself, Lizz Loop, Missy
 14 Rushing, and maybe --
 15 Yeah. I think it was just the three of
 16 us.
 17 Q. Okay. Do you recall what particular
 18 criticisms Mr. Kalsbeek had of this document?
 19 A. Let me find the line.
 20 Where I state, "They are scheduled for
 21 replacement starting on Monday until the job is
 22 complete."
 23 Q. And what objection did he have about
 24 that statement?
 25 A. I was telling the tenants this was going

[Page 49]

1 to happen without receiving approval from the
 2 owners.
 3 Q. Was that communication via phone or via
 4 e-mail?
 5 Do you recall?
 6 A. I don't recall.
 7 Q. Let me hand you what's been previously
 8 marked as Exhibit 59.
 9 Have you ever seen that document before?
 10 A. Looks familiar. Probably not this
 11 specific one because it shows testing done in March
 12 of 2012, and I didn't have any part of it after --
 13 really after 2011 when it came to testing.
 14 Q. Okay. With regard to the testing in
 15 August of 2011, that line -- the first line --
 16 A. Uh-huh.
 17 Q. -- do you know who conducted the carbon
 18 monoxide testing at First Rate to get those
 19 results?
 20 MR. ANDERSON: Form.
 21 THE WITNESS: I've --
 22 This is -- I believe this is when
 23 Express Plumbing did the testing.
 24 MR. CLARK: Okay.
 25 (Deposition Exhibit No. 90 was marked.)

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[17] (Pages 47 to 50)

1 Q. And in that e-mail, as you can see where
2 it begins, "If the air in the flue tests 100-plus,
3 call the owner to discuss replacement."
4 Do you see where I'm at?
5 A. Yes.
6 Q. Do you know if Matt Switzer was ever
7 called or contacted by anyone at First Rate
8 following March 21st, 2012 --
9 A. I don't --
10 Q. -- with regard to high carbon monoxide
11 emissions in Building 46?
12 A. I don't know.
13 Q. Do you know if there was an e-mail
14 follow-up to Matt Switzer by anyone at First Rate?
15 MR. ANDERSON: After March 21, 2012?
16 MR. HAMAN: Correct.
17 Thank you, Counsel.
18 MR. ANDERSON: Thank you.
19 THE WITNESS: I don't -- I don't know.
20 Q. (BY MR. HAMAN) Do you know if a carbon
21 monoxide/fire detector combo was installed in any
22 of the units in Building 46 after March 21st, 2012?
23 A. I don't know.
24 Q. Do you know if a follow-up test was
25 conducted within 30 days of March 21st, 2012, in

[Page 227]

1 any of the units in Building 46?
2 A. I don't know.
3 Q. And then that paragraph ends with
4 "educate tenants."
5 Is it your testimony that Exhibit 14 is
6 the extent of educating the tenants?
7 MR. ANDERSON: Hold on.
8 Mike, where are you on "educate
9 tenants"? I'm just trying to --
10 MR. HAMAN: Yeah. The e-mail on --
11 MR. ANDERSON: Oh, I see it. Sorry.
12 MR. HAMAN: Yeah. Thank you.
13 THE WITNESS: That was my understanding.
14 Q. (BY MR. HAMAN) And what's the basis of
15 your understanding?
16 In other words, did someone tell you
17 that was all you needed to do?
18 A. No. That's just what I understood.
19 I didn't have much to do at Sagecrest as
20 of -- at that point in time. I didn't handle the
21 maintenance. I didn't do any of the testing. I
22 didn't do any of the educating of tenants or
23 anything at that point.
24 I really mostly just focused in the
25 summer of 2011.

[Page 228]

1 Q. I understand. You did prepare Exhibit 14, correct?
2 A. Yes.
3 Q. And did you do that on your own, or did
4 someone ask you to prepare that?
5 A. I did that on my own.
6 Q. And did Tony approve of Exhibit 14?
7 A. No.
8 Q. Did you run it by Tara before submitting
9 it to the tenants?
10 A. No.
11 Q. Did you tell Tara that this is what you
12 were going to do?
13 MR. ANDERSON: At the time she created it?
14 MR. HAMAN: Correct.
15 THE WITNESS: I believe Tara was on vacation
16 at that time.
17 Q. (BY MR. HAMAN) Okay.
18 A. That's why I was there.
19 Q. And then my understanding is that Missy
20 placed them on the various doors of the units
21 throughout the complex?
22 A. Yeah. Myself, Missy, and Lizz Loop.
23 Q. Did you ever think to e-mail the owners
24 a copy of Exhibit 14?
25

[Page 229]

1 A. Yes.
2 Q. Did you e-mail any of the owners a copy
3 of Exhibit 14?
4 A. I don't recall if that exhibit was in
5 the original e-mail that I sent to the owners
6 informing them of their carbon monoxide issues.
7 Q. What original e-mail are you referring
8 to?
9 A. Let me find the exhibit.
10 MR. HOWELL: 86.
11 MR. ANDERSON: It's 86.
12 THE WITNESS: 86.
13 Q. (BY MR. HAMAN) 86 was prepared in July
14 and August of 2011.
15 When did you prepare Exhibit 14?
16 A. Let me double check Exhibit 14.
17 Q. Thank you.
18 A. Sorry.
19 At that time in July of 2011.
20 Q. Okay. And so my understanding then is
21 that you would -- or someone at First Rate would
22 put this notice on a unit's door if that unit came
23 back with what you believed to be a high reading of
24 carbon monoxide emissions?
25 A. That's what I did at that time. Whether

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[62] (Pages 227 to 230)



1 Q. (BY MR. CLARK) And I think your response
2 was, "Well, if we would have, Chris would have done
3 it, and we would have had work orders."

4 A. Yes.

5 Q. Okay. So if there wasn't a work order
6 saying Chris had inspected the carbon monoxide
7 detectors in 4624 sometime after October 10th,
8 2012, then you have no recollection of that being
9 done?

10 MR. ANDERSON: Form.

11 THE WITNESS: No, I don't.

12 MR. CLARK: Unfortunately, I don't have a
13 marked copy, but this is Adra Kipper's Exhibit 14.

14 Q. (BY MR. CLARK) Ms. Gaertner, have you
15 ever seen this document before?

16 A. Yes.

17 Q. And do you know who drafted the
18 document?

19 A. I believe Sheila Thomason did.

20 Q. Okay. Did you deliver copies of this
21 document to any apartments at Sagecrest?

22 A. To any?

23 Q. Yes.

24 A. Yes.

25 Q. Do you recall sending or delivering one

1 of these to Apartment 4624?

2 A. Yes.

3 Q. And what else did you deliver with this
4 document?

5 A. A battery-operated carbon monoxide
6 detector.

7 Q. Okay. Did you have a conversation with
8 the tenant when you made the delivery?

9 A. No.

10 Q. How did you deliver this document?

11 A. I believe Missy actually ran it up there
12 and tied it to her door.

13 Q. Do you have a document showing the
14 delivery of these documents to certain apartments?
15 Like a daily log entry saying, "Missy delivered the
16 notice to Apartment 4624 on such and such a date"?

17 A. I don't have anything that detailed.

18 Q. How do you know that it was Missy that
19 delivered the --

20 A. We were driving around. I believe I was
21 driving and Missy was running them up there.

22 Q. Okay. And what was the criteria that
23 prompted the delivery of these particular notices?

24 A. When we detected high levels of carbon
25 monoxide in the tenant's unit --

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**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
 OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH *et al.*,

Plaintiffs,

vs.

**SAGECREST MULTI FAMILY
 PROPERTY OWNERS' ASSOCIATION
et al.,**

Defendants.

Case No. CV PI 1304325

**PLAINTIFFS' RESPONSE TO POA'S
 SUPPLEMENTAL BRIEF RE: MOTION
 FOR SUMMARY JUDGMENT**

The POA's supplemental briefing does little more than confirm that this Court's original denial of the POA's summary judgment motion was correct: the POA's arguments that it did not control the CO response at Sagecrest, or assume any duties, present the Court with genuine disputes of material fact. Summary judgment is improper.

TR

FACTS

The POA's Memorandum in Support of Reconsideration of POA's Motion for Summary Judgment highlights the numerous critical areas of disputed fact that evidence the POA's duty to Plaintiffs, and disallow summary judgment.

1. The POA states that owners of Sagecrest buildings have the distinct, express, and exclusive responsibility to maintain the interiors of residential units they own. (POA Memo, at 3). Plaintiffs and First Rate and Switzer have presented extensive evidence to the contrary. (*See, e.g.*, Plaintiffs' Supp. Brief re: POA's MSJ, at 3-9, ¶¶ 1-14; 16-19; 21-22; First Rate Memo. In Opp. To Reconsideration of POA SJ, at ¶¶ 6, 12, 15, 16, 18, 24, 26-33, 35, 40-41, 47-51, 54-57; and Switzer Memo, at 4-5 (there is, at a minimum, an issue of fact regarding whether Section 3.4 was modified such that Defendant Sagecrest, through its President, shared duties))
2. The POA states that it has "no independent power or authority to perform any service, repairs, or maintenance on the interiors of the residential units." (POA Memo, at 3). Plaintiffs and First Rate and Switzer have presented extensive evidence to the contrary: (Plaintiffs' Supp. Brief re: POA's MSJ, at 3-9, ¶¶ 1-14; 16-19; 21-22; First Rate Memo. In Opp. To Reconsideration of POA SJ, at ¶¶ 6, 12, 15, 16, 18, 24, 26-33, 35, 40-41, 47-51, 54-57; and Switzer Memo, at 4-5 (there is, at a minimum, an issue of fact regarding whether Section 3.4 was modified such that Defendant Sagecrest, through its President, shared duties))
3. The POA states that it did not have a duty, nor did it assume a duty to perform any of these tasks [referring to allegations contained in Plaintiffs' Fourth Amended Complaint]. (POA Memo, at 4). The POA again disregards and seems to forget the entire factual record, and the facts relied on in Plaintiffs' Supplemental Brief, at 3-9, ¶¶ 1-14; 16-19; 21-22; First Rate Memo. In Opp. To Reconsideration of POA SJ, at ¶¶ 24, 26-33, 40-41, 47-51, 54-57; and Switzer Memo, at 4-5 (there

is, at a minimum, an issue of fact regarding whether Section 3.4 was modified such that Defendant Sagecrest, through its President, shared duties)

ARGUMENT

1. PREMISES LIABILITY DUTY: CONTROL IS GENUINE ISSUE OF MATERIAL FACT

Whether the POA owed Plaintiffs a duty depends on the control it exerted at the property. There is a factual dispute over the POA's level of control over the CO response at Sagecrest for purposes of Plaintiffs' premises liability claim — summary judgment is not appropriate here. *See Herrera v. Estay*, 146 Idaho 674, 679-80, 201 P.3d 647, 652-53 (2009) (remanding to district court to specify the reasons underlying its grant of summary judgment in light of factual dispute over whether there was sufficient control to give rise to a duty); *Doan ex rel. Doan v. City of Bismarck*, 2001 ND 152, ¶ 16, 632 N.W.2d 815, 821 (finding triable issues of fact as to which defendant had control over the premises precluded summary judgment); *Anzures v. Prologis Texas I LLC*, 886 F. Supp. 2d 555, 569-70 (W.D. Tex. 2012) (recognizing rule that whether a defendant has control over the premises is generally a question of fact for the jury); *Wemple ex rel. Dang v. Dahman*, 103 Haw. 385, 394, 83 P.3d 100, 109 (2004) (noting that the amount of control over the premises is ordinarily a question of fact for the jury).

The POA's supplemental brief highlights numerous areas of factual dispute. For example, the POA claims it merely "help[ed]" First Rate create CO testing procedures, POA Suppl. Br. at 11, whereas Plaintiffs submitted extensive evidence that the POA completely controlled the CO response and rejected First Rate's suggested procedures. P's Suppl. Br., at 3-9. Also, the POA claims it is "undisputed" that the decision to install a CO detector rested solely with the unit owner, POA Suppl. Br. at 13, whereas Plaintiffs submitted evidence that Mr. Kalsbeek insisted the owners had no input on this issue, and that installing CO detectors did not require owner approval, and, the POA enforced a policy

whereby its agent First Rate undertook to install hard-wired CO detectors at the POA's direction. P's Supp. Br., at 4, ¶¶6; 5-7 ¶¶9-117; 6, ¶¶ 14-16.

In sum, Plaintiffs presented evidence that Mr. Kalsbeek and the POA exerted staggering control over First Rate, over the response to the CO problem at Sagecrest, and over the unit interiors. Defendant POA – for obvious reasons – would like to spin the record in a contrasting direction, and divert this Court's attention away *from the actual facts*. But viewing the facts in the light most favorable to Plaintiffs, it is unquestionable that the POA controlled the unit interiors, or, at a minimum, there exists a question of fact as to whether the POA controlled the unit interiors sufficient as to give rise to a premises liability duty to Plaintiffs. The extent of the POA's control over the CO response at Sagecrest presents a classic question of fact for the jury, and summary judgment is improper.¹

2. VOLUNTARILY ASSUMED DUTY

While the POA relies heavily on a contract and CCRs, etc, neither Plaintiffs' claims nor the POA's duties arise out of or are constrained by any written documents or agreements. *See Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 350, 179 P.3d 309, 313 (2008) (noting that negligent conduct and breach of contract are two distinct theories of recovery.); *In re Otero Cnty. Hosp. Ass'n, Inc.*, 514 B.R. 315, 326-27 (Bankr. D.N.M. 2014) (explaining that actual control and active participation – not the respective contracts – defined the defendant's tort duty: “[T]he tort liability of an employee or an agent for an omission is determined by the law of negligence and is not limited to the affirmative obligations of the contract of service. . . . [defendant's] tort duty to the [plaintiffs] is therefore not solely defined by

¹ The POA's reliance on *Robinson v. Mueller*, 156 Idaho 237, 322 P.3d 319 (Ct. App. 2014) is misplaced. There, the Idaho Court of Appeals emphasized that there was no evidence that the landlord ever undertook maintenance of the dormer with respect to any handrails, and, furthermore, “[t]he condition at issue here—a recessed dormer—was not subject to the type of repair or maintenance that Robinson contends the landlord was responsible for. Rather, it was a feature of the property. Robinson does not predicate her claim on the deficiency of any repair actually done by the landlord.” 156 Idaho at 241, 322 P.3d at 323. Here, the POA cannot seriously contend that tenant Kipper controlled the CO response at Sagecrest or the replacement of the water heater in the apartment.

its contractual obligations”); *Kay v. Danbar, Inc.*, 132 P.3d 262, 270-71 (Alaska 2006) (noting that in *LaMoureaux v. Totem Ocean Trailer Express, Inc.*, 651 P.2d 839 (Alaska 1982), “the question was whether a union owed a duty of care to a victim of a truck collision to ensure that union members dispatched to drive were qualified drivers. The agreement between a trucking company and the union provided only that the union would dispatch regular and experienced longshoremen. Based on testimony that the union had actually undertaken the responsibility to supply competent and licensed drivers, we concluded that a genuine issue of fact existed about whether the union had voluntarily assumed a duty of care to ensure that members dispatched as drivers could lawfully drive even though the contract did not explicitly require the union to check its members' driving qualifications.”) (footnotes omitted).

Factual disputes about an assumed duty preclude summary judgment. It is the POA's *conduct* – not a *contract* – that gives rise to the POA's duty. Genuine issues of material fact exist about whether the POA assumed a duty with regard to the CO response—summary judgment is improper. See *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 402, 987 P.2d 300, 314 (1999) (questions of fact regarding whether a defendant assumed a duty through a voluntary undertaking precluded grant of summary judgment); *Albertson v. Fremont Cnty., Idaho*, 834 F. Supp. 2d 1117, 1136-37 (D. Idaho 2011)(“Concerning Plaintiffs' ordinary negligence claim against the County, the Court finds that disputed material facts exist as to whether the County assumed a duty owed to Mr. Albertson and as to whether the County breached this duty. The existence of disputed material facts on these issues precludes summary judgment in the County's favor.”); *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 612, 873 P.2d 861, 866 (1994) (“Liberally construing the facts in favor of Jones and making all reasonable inferences in his favor, we conclude there is a genuine issue of material fact whether Runft undertook a voluntary duty to act in Jones's best interests in handling the transaction.”); *Ironwood Springs Christian Ranch, Inc. v. Walk to Emmaus*. 801 N.W.2d 193, 199

(Minn. Ct. App. 2011) (noting that determining whether one owes a legal duty is a question for the court, but whether a legal duty has been assumed is a question of fact); *Sizemore v. Templeton Oil Co.*, 724 N.E.2d 647, 651 (Ind. Ct. App. 2000) ("Although the determination of whether a duty exists is generally a question of law, whether a party assumed a duty and the extent of that duty are questions for the fact-finder.").

The Colorado Supreme Court explained:

Under the "assumed duty" or "good samaritan" doctrine set forth in *Lester v. Marshall* and section 323, the question of whether the school district assumed duties to the respondent over and above those owed as a matter of law is obviously not a purely legal question. Rather, it becomes a mixed question of law and fact, since any determination that a defendant has assumed a duty must be predicated on two factual findings. A plaintiff must first show that the defendant, either through its affirmative acts or through a promise to act, undertook to render a service that was reasonably calculated to prevent the type of harm that befell the plaintiff. *See, e.g., Williams v. Municipality of Anchorage*, 633 P.2d 248, 251 (Alaska 1981) (court, in reversing summary judgment, held that, "The precise nature and extent of [an assumed] duty, while a question of law, depends upon the nature and extent of the act undertaken, a question of fact."); *Erickson v. Lavielle*, 368 N.W.2d 624, 627 (S.D.1985) (although the existence of a duty is usually a legal question, summary judgment reversed on ground that assumption of duty is also based on the factual question of whether the defendant undertook to render assistance, which is a jury question). . . . Second, a plaintiff must also show either that he relied on the defendant to perform the service or that defendant's undertaking increased plaintiff's risk . . .

Where, as here, a plaintiff presents some evidence of an affirmative act or promise to act sufficient to create an inference that the defendant undertook a service that would have prevented plaintiff's injuries, that factual question precludes summary judgment on the issue of whether the defendant undertook such a service. *See, e.g., Williams v. Municipality of Anchorage*, 633 P.2d at 251-52; *Ember v. B.F.D., Inc.*, 490 N.E.2d 764, 770 (Ind.App.1986); *Cooperwood v. Auld*, 175 Ga.App. 694, 334 S.E.2d 22, 23 (1985); *Massingale v. Sibley*, 449 So.2d 98, 101 (La.App.1984).

Jefferson County School District R-1 v. Justus, 725 P.2d 767, 771-72 (Colo. 1986) (footnote omitted) (emphasis added).

Finally, the POA's complaint that tenant Kipper did not know or previously speak to any POA board members is of little moment. A personal relationship or first name basis is not a prerequisite to

reliance. In *Baccus*, for example, there was no evidence that the employee who fell in a matless doorway ever knew of the existence of the Ameripride corporation (the company that should have provided the mats), or ever spoke to an Ameripride representative prior to the incident, yet the court presumed there was reliance. *See Baccus*, 145 Idaho at 352, 179 P.3d at 315. It did not matter to the employee who was supposed to place mats; *it mattered only that the mats were placed*. The POA's claim that a party must know the particular entity or person responsible is unsupported by Idaho law.

This Court should reject the POA's argument that it didn't assume a duty because it "*wasn't supposed to act*," in light of evidence that the POA assumed a duty because *it actually did act*.

3. AGENCY

The POA's Memo fails to even reference the POA's liability for the acts of its agent, First Rate. In addition to Plaintiffs' direct liability claims, summary judgment should be denied because the POA is liable for First Rate's negligent acts and omissions committed within the course and scope of its express, implied, and/or apparent agency. *See P's Supp. Br.*, at 16-17.

CONCLUSION

The Court accurately analyzed the issues at the original POA summary judgment hearing – summary judgment is improper where the facts establish that the POA owed a duty to Plaintiffs under premises liability, voluntarily assumed duty, and agency theories. Now, taking a closer look at the POA's authority and control over water heater replacement, and its actual role in the CO response at Sagecrest, the result of Defendant's Motion is the same. Summary Judgment should be denied.

DATED this 9th day of March, 2015.



TYSON E. LOGAN, logan@spencelawyers.com
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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2015, I caused a true and correct copy of the foregoing to be served via email, addressed to the following:

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NO. 837 FILED
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APR 13 2015

CHRISTOPHER D. RICH, C.
By BETH MASTERS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, et al,

Plaintiffs,

vs.

SAGECREST MULTI-FAMILY PROPERTY
OWNERS' ASSOCIATION, et al,

Defendants.


Case No. CV-PI-1304325

**ORDER GRANTING DEFENDANTS
KALSBECK, ARLA, SCHWAB AND
MEISNER'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court is the Motion for Summary Judgment filed by Defendants Jon Kalsbeek, Jay Arla, Chris Schwab and David Meisner. The Court has received and reviewed the of papers and pleadings in support of and in opposition to the Motion, heard oral argument on January 15, 2015, and is fully advised in the premises.

NOW, THEREFORE, based upon the aforesaid record and the rationale and authorities articulated on the record by the Court at said hearing, IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by Defendant Jon Kalsbeek, Jay Arla, Chris Schwab and David Meisner is **GRANTED**.

DATED this ^{9th} 17 day of April 2015.


The Honorable Cheri C. Copsey
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April 2015, I caused a true and correct copy of the foregoing **ORDER GRANTING DEFENDANTS KALSBECK, ARLA, SCHWAB AND MEISNER'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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CHRISTOPHER D. RICH



Deputy Clerk

MAY 26 2015

CHRISTOPHER D. RICH, Clerk
By BETH MASTERS
DEPUTY

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, *et. al.*,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS' ASSOCIATION,
INC., *et. al.*,

Defendants.

Case No. CV-PI-2013-04325

ORDER RE: MOTIONS FOR
RECONSIDERATION OF
SAGECREST POA AND SWITZER
SUMMARY JUDGMENT DECISIONS

The Court orally denied summary judgment to Sagecrest Multi Family Property Owners' Association ("Sagecrest POA") on December 11, 2014. However, subsequently, on January 15, 2015, the Court informed the parties that it intended to reconsider Sagecrest POA's motion for summary judgment and invited additional briefing. During that hearing the court stated:

Having re-read the record, in particular the deposition material and all the e-mails, the Court questions whether Sagecrest POA had a duty of care, recognized by law, to Adra Kipper or her licensees to repair the water heater in her unit or to warn her of problems with her water heater.

Sagecrest POA moved for reconsideration. Plaintiffs Forbush/Halowell, Defendant First Rate Property Management ("First Rate"), and Defendant Switzer opposed reconsideration.

The Court also denied in part and granted in part Switzer's Motion for Summary Judgment in a written decision issued on September 24, 2014. In that decision, the Court found that Switzer had no duty to warn the Forbush/Halowell, as licensees, about carbon monoxide problems. During a hearing on First Rate's summary judgment, the Court suggested that its prior ruling on this issue may be incorrect. Forbush/Halowell moved the Court to reconsider its ruling on the duty to warn issue. Switzer and First Rate opposed.

1 The Court heard argument on reconsideration on April 16, 2015, and took the matter
2 under advisement effective on April 27, 2015, because the Court was in a three week trial running
3 9 a.m. to 5 p.m. every day.

4 Based on the following, the Court reconsiders its Sagecrest POA decision and grants
5 Sagecrest POA summary judgment.

6 The Court likewise grants Forbush/Halowell's motion to reconsider its Switzer decision,
7 in part, and denies Switzer partial summary judgment on the duty to warn. Whether the warning
8 First Rate issued on Switzer's behalf in 2012 was sufficient to warn Kipper of the carbon
9 monoxide danger posed by the water heater is a question for a jury.

10 **RELEVANT FACTUAL BACKGROUND**

11 The Sagecrest Apartment Complex consists of 48 separate buildings, each unit having four
12 individual apartments. Each separate building is owned by an individual or entities who are
13 shareholders in Defendant Sagecrest Multi Family Property Owners' Association, a not-for-profit
14 corporation.

15 In 2004, Sagecrest Development, LLC recorded the Declaration of Covenants, Conditions
16 and Restrictions ("CC&Rs") applicable to the Sagecrest Apartment subdivision, its owners, and
17 the Sagecrest POA. Sagecrest POA incorporated as a non-profit corporation and its Articles of
18 Incorporation describe its purposes and powers, in relevant part, as follows:

19 [I]t [Sagecrest POA] is formed to provide for maintenance, preservation and
20 architectural control of those certain lots as established in the Declaration of
21 Covenants, Conditions, and Restrictions of Sagecrest Subdivision . . . and to
22 promote the health, safety, and welfare of the residents within the subdivision
established by the Declarations

23 ***

24 (a) exercise all of the powers and privileges and to perform all of the duties
and obligations of the Association as set forth in the Declarations

25 Sagecrest POA Articles of Incorporation, (emphasis added). Sagecrest Development LLC's
26 CC&Rs prescribe Sagecrest POA's powers and responsibilities and allocate the powers and duties
27 between the owners of the individual four apartment buildings and Sagecrest POA. According to
28 the CC&Rs all individual building owners are members of Sagecrest POA.

1 ARTICLE VI.

2 SAGECREST MULTI FAMILY SUBDIVISION PROPERTY OWNERS'
3 ASSOCIATION

4 6.2: Each person or entity who is a record Owner of a fee or undivided fee interest
5 in any Residential Lot shall be a Member of the Association. . . .

6 In addition, the CC&Rs specifically allocate responsibility for maintaining and controlling the
7 apartments between the individual building owners and the Sagecrest POA. The CC&Rs clearly
8 indicate that the individual owners control and are responsible for maintaining and repairing the
9 interior areas of the apartments, including the water heaters. Sagecrest POA only controls the
10 exterior areas and is responsible for exterior maintenance and repair. The CC&Rs provide, in
11 relevant part, as follows:

12 ARTICLE VI.

13 NATURE OF OWNERSHIP/MAINTENANCE

14 3.3 Maintenance of Lots and Four Plexes¹.

15 A. The Association shall maintain the following:

- 16 1. The following portions of the exterior of each Four Plex: ...
17 including the entry way, exterior stairs, railings and decks, and
18 roofs.
- 19 2. All Sidewalks on the Property.
- 20 3. All landscaping on the Property, including, without limitation, all
21 grass areas, shrubs, trees and bushes that are on Residential Lots
22 and the Recreational Center Lot, and all planters, whether they are
23 on Residential Lots or in the Common Areas.
- 24 4. Drainage Facilities, including the Drainage Lot.
- 25 5. The Common Areas.
- 26 6. Any perimeter fence.
- 27 7. The main lines, service lines, valves, and sprinkler heads of the
28 PUIS [pressurized irrigation system] on the Property to the extent
29 that they are not maintained by the Nampa Irrigation District.

30 ¹ Four Plex is defined as "a residential building on each Residential Lot of the Property that is comprised of four
31 separate single family residential units." See CC&Rs, Article II, Definitions. Residential Lots are defined as "all Lots
32 on the Multi Family Portion of the Plat, except the Recreational Center Lot, the Driving and Parking Lot, and the
Drainage Lot." *Id.*

1 B. The Owner shall maintain the following:

- 2 1. The following portions of the exterior of the each Four Plex:
3 windows, doors, exterior air conditioning units and all other
4 exterior maintenance not performed by the Association; and
5 2. The **entire interior of the Four Plexes, including but not limited**
6 **to flooring, ceilings, walls and wall coverings, appliances,**
7 **plumbing and plumbing fixtures, electrical system and fixtures,**
8 **all interior components of the heating and air conditioning**
9 **system.**

10 ***

11 3.5 Owner's Right with Respect to Interiors: Each Owner shall have the
12 **exclusive** right to ..., repair, ... or otherwise maintain, ... the **interior** portions of
13 their Four Plex,

14 3.6 Easements for Access for Repair, Maintenance: The Association is hereby
15 granted an irrevocable easement for purposes of access to and upon each
16 Residential Lot and Four Plex, during reasonable hours and as necessary for the
17 maintenance and repair of the Residential Lot and Four Plex thereon.

18 ***

19 3.8 Failure of Owner to Maintain such Owner's Residential Lot or Four Plex:
20 In the event the Owner of any Residential Lot improved with a Four Plex shall fail
21 to maintain any portion of such Owner's Residential Lot that **Owner is**
22 **responsible to maintain**, in a manner reasonable [sic] satisfactory to the Board,
23 after approval by vote of at least sixty percent (60%) of the members of the Board
24 present and voting and subject to such Owner's right to notice and a hearing before
25 the Board, the Association may, through its agents and employees, enter upon the
26 Residential Lot or Four Plex and repair, maintain and restore the Residential Lot,
27 or the Four Plex.

28 ***

29 ARTICLE IX.

30 RESERVED EASEMENTS

31 ***

32 9.3 Maintenance Easement: An easement is hereby reserved to Declarant
[Sagecrest Development LLC or its successor] and any member of the Board of
Directors [of the Sagecrest POA] or Manager, and their respective officers, agents,
employees and assigns, upon, across, over, in and under the Property and a right to
make such use of the Property as may be necessary or appropriate to make
emergency repairs or to perform the duties and functions which the Association is
obligated or permitted to perform, including but not limited to the following: the
right to enter upon any Residential Lot and the **exterior** of any Four Plex for the
purpose of performing repairs and maintenance to such Residential Lot or Four
Plex, as provided herein; and the right to enter upon any Residential Lot to perform

1 landscaping services, and to install, repair and maintain the PUIS [pressurized
2 irrigation system].

3 CC&Rs (emphasis added).

4 Important to the Court's analysis are the definitions found in the CC&Rs. "Four Plex" is
5 defined as "a residential building on each Residential Lot of the Property that is comprised of four
6 separate single family residential units." *See* CC&Rs, Article II, Definitions. "Residential Lots" is
7 defined as "all Lots on the Multi Family Portion of the Plat, except the Recreational Center Lot,
8 the Driving and Parking Lot, and the Drainage Lot." *Id.* "Property" is defined as "the real property
9 described in Exhibit A." *Id.*

10 Defendant Switzer owns building number 46 and the four apartments within that building,
11 including Apartment 4624. Switzer has owned these apartments since February 2008.

12 From 2006 to early 2010, Defendant H&H Properties acted as the property manager at
13 Sagecrest. During the time H&H Properties managed the Sagecrest Apartment Complex, H&H
14 Properties had an oral agreement with Defendant Anfinson Plumbing to perform plumbing work
15 as needed. In April 2009, the tenant in Apartment 4624 contacted H&H Properties complaining
16 there was no hot water. H&H Properties contacted Anfinson Plumbing.

17 Anfinson Plumbing replaced the burner assembly in the gas-fired water heater in
18 Apartment 4624 but failed to install a thermocouple with the integrated thermal cut off switch
19 ("TCO"). An integrated thermal cut off switch is a safety device that Forbush/Halowell alleges
20 would have prevented the carbon monoxide leak and their injuries in 2012. Instead, the plumber
21 allegedly replaced the burner assembly with a standard thermocouple without an integrated TCO.

22 On March 15, 2010, Sagecrest POA contracted with First Rate Property Management
23 ("First Rate"), to act as a property manager and entered into an agreement ("First Rate-Sagecrest
24 POA Agreement"). The First Rate-Sagecrest POA Agreement provides, in relevant part, as
25 follows:

26 3.0 DUTIES OF AGENT

27 3.1 Receive maintenance requests and complaints relating to the
28 property, and in a timely and efficient manner inform the
29 appropriate contractors (which shall be selected by
30 ASSOCIATION) or ASSOCIATION employees or Board of
31 Directors of the necessity of corrective action.

3.3 Promptly notify the ASSOCIATION in the event any matter comes to the attention of AGENT relating to the condition of the Property or any violation of ASSOCIATION rules and regulations, which requires the attention of the ASSOCIATION.

3.4 Take such action as AGENT deems reasonable and appropriate in the event of any emergency brought to AGENT's attention which may result in damage to the Property or cause injury to tenants and occupants of the Property. Notwithstanding this authority, it is understood and agreed that AGENT will if at all possible, confer immediately with the President or other authorized officer of the ASSOCIATION regarding all emergency repairs in excess of \$300.00 without first obtaining approval of the ASSOCIATION.

7.0 AUTHORITY OF PARTIES

7.1 ASSOCIATION hereby grants to AGENT the authority and power to perform such acts and deeds, and to incur such costs and expenses, all on behalf of and as agent for the ASSOCIATION, as shall be reasonable and necessarily required to carry out AGENT's duties and responsibilities hereunder.

First Rate-Sagecrest POA Agreement, (emphasis added).

In addition to entering into an agreement with Sagecrest POA to manage and maintain the complex's exterior and grounds, First Rate contracted separately with each individual Four Plex owner to manage and maintain the respective apartments' interiors. First Rate was NOT the property manager for all the Four Plex owners -- only those who contracted with it for its services. First Rate entered into a total of 44 separate property management agreements with owners.

Switzer and First Rate entered into a property management agreement ("Switzer-First Rate Agreement") for First Rate to manage Switzer's Building 46 and the four apartments within that building, including Apartment 4624. The Switzer-First Rate Agreement provided, in relevant part, as follows:

2. APPOINTMENT OF AGENT

2.1 OWNER hereby appoints AGENT as sole and exclusive agent of OWNER to manage the PREMISES described in paragraph 2.2 upon the terms and conditions provided herein. AGENT accepts the appointment and agrees to furnish the services of its organization for the management of the PREMISES.

1 2.2 The property to be managed by AGENT under this AGREEMENT
2 (the "PREMISES") is located at 1805 E. Overland Bldg. 46 #11.
3 #12. #23 and #24 the city of Meridian in the state of Idaho.

4 2.5 OWNER authorizes AGENT to contract for services to include but
5 not limited to, water, sewer, garbage, **gas, electric**, irrigation, yard
6 care, maintenance agreements, and coin operated washer and dryers.
OWNER to assume the obligation of any contracts entered.

7 9. MAINTENANCE AND REPAIRS

8 9.1 AGENT is authorized to make or cause to be made, through
9 contracted services or otherwise, all ordinary repairs and
10 replacements reasonably necessary to preserve and maintain the
11 PREMISES in an attractive condition and in good state of repair for
12 the operating efficiency of the PREMISES, and all alterations
13 required to comply with lease requirements **AGENT is also**
14 **authorized to purchase or rent, on OWNER's behalf, all**
15 **equipment, tools, appliances, materials, supplies, and other**
16 **items necessary for the management, maintenance, or operation**
17 **of the PREMISES** AGENT shall not be liable to OWNER for
18 any act, omission, or breach of duty of such independent contractors
19 or suppliers.

17 9.4 Agent shall contract for bi-annual Preventative Maintenance at the
18 expense of the Owner. **The contractor will check all plumbing**
19 **and plumbing fixtures, caulking, door stops, dryer vents, smoke**
20 **detectors, and furnace filters and make necessary repairs**

21 9.5 The expense incurred for any one transaction shall not exceed
22 \$250.00, except monthly or recurring operating charges and
emergency repairs, unless otherwise authorized by the OWNER,
typically done by e-mail.

23 19. SPECIAL POWER OF ATTORNEY

24 KNOWN ALL MEN BY THESE PRESENTS; that the OWNER has made,
25 constituted, and appointed and by these presents do make, constitute and appoint
26 First Rate Property Management, Inc. and its agents, true and lawful attorney for
27 and in their name, place and stated, and for their use and benefit as follows: (Idaho
Code, Section 15-12-105)

28 19.2 ...to order, direct, superintend, and manage all repairs,
29 alterations, and improvements...in general, to do and perform
30 all acts and things incident to management of the
31 PREMISES....

1 Switzer-First Rate Agreement, (emphasis added).

2 On April 8, 2011, Adra Kipper leased Apartment 4624 in the Sagecrest Apartments, and
3 executed a one-year rental agreement with First Rate ("Kipper-First Rate Agreement"). She
4 renewed that agreement for one year on March 19, 2012. Adra Kipper was the sole occupant
5 except for when her children or her boyfriend came to stay. The Kipper-First Rate Agreement
6 provided, in relevant part, as follows:

7 **THIS AGREEMENT**, made and entered *April 8th, 2011*, between First Rate
8 Property Management, Inc., as acting Agent for Owner of the below named
9 property and herein after called "Landlord," and **ADRA KIPPER** hereafter called
"Tenant."

10 1. **AGENT:** Tenant understands that Landlord [First Rate] is the acting agent
11 of the "Owner."

12 34. **ENTRY AND INSPECTION.** Landlord has the right to enter the Premises
13 and Tenant agrees not to unreasonably withhold from the Landlord consent to
14 exhibit the Premises to ... workmen, contractors

15 39. **REPAIRS AND MALFUNCTIONS.** All service or repairs, which fall
16 within the responsibility of the Landlord, shall be requested in writing. Tenant
17 shall not make repairs or hire contractors to make repairs. Landlord shall respond
18 to the emergency maintenance request, as soon as possible. For the purposes of this
19 Rental Agreement, emergency maintenance is ... smell of gas. Tenant is directed
20 to call 911 for emergencies causing immediate danger such as fire Tenant
agrees to attempt to remedy the below maintenance issues prior to notifying
Landlord:

21 5. **No hot water:** Check thermostat on tank for proper temperature
22 setting. Check that thermostat is not set to "vacation." Check and
23 reset breaker in power panel. Check and reset button next to
thermostat.

24 41. **ACCESS FOR REPAIRS:** Tenant hereby agrees, requests, and authorizes
25 Landlord to allow maintenance contractors and personnel to check out a key from
26 Landlord with the sole purpose to gain access to the property to make necessary
27 repairs....

28 Kipper-First Rate Agreement (emphasis in the original). Kipper did not have any contact with
29 Switzer or any member of the Sagecrest POA and dealt only with First Rate. She also testified
30 that she did not even know anything about Sagecrest POA and had never even heard of any of its
31

1 officers. By virtue of this agreement, Kipper had no authority to make repairs or to hire anyone to
2 repair the water heater.

3 During summer 2011, First Rate learned that several units' water heaters were causing
4 problems. On July 19, 2011, Jon Kalsbeek, the president of Sagecrest POA, notified other
5 Sagecrest POA officers that:

6 A situation occurred today with a building unit of having a gas smell, this caused
7 the gas company to investigate the situation and found that the original water
8 heaters are considered hazardous by the gas company, this has prompted the need
9 to replace them. FRPM [First Rate] is in the process of working with owners to get
10 these units replaced. More information should be coming from FRPM. The water
11 heaters are out of warranty.

12 The officers discussed finding out if there had been a recall in a series of emails. In particular, the
13 officers discussed Intermountain Gas's and Express Plumbing's concerns that some of the water
14 heaters had been modified and that tenants had smelled gas. However, they all recognized this
15 was an issue that needed owner decisions.

16 [T]he gas company discussed this [the modifications] with express and does not
17 like that the water heater is being modified. The problem is gas smell and fumes
18 from either the intake being clogged or the exhaust vent clogging. Is this a defect
19 of the water heater or maintenance issue. FRPM is researching this with express
20 plumbing and the gas company. The gas smell and high CO2 readings is what the
21 concern is and why it is being explained as hazardous.

22 These water heaters are over 6 or 7 years old, I believe this is average time of
23 replacement, ours usually go out at 5 to 6 years and if you are really lucky maybe
24 close to 10 years. **FRPM is working with each owner that has this brand of
25 water heater –to deal with replacement. This was more of an informational
26 item than anything else. I am trying to get something out to all owners from
27 the board,**

28 (Emphasis added.)

29 During that same time frame, First Rate discussed possible actions. On July 20, 2011, First
30 Rate Sagecrest property manager, Tara Gartner, emailed Tony Drost, First Rate president,
31 detailing the problems they had been encountering. After observing that everyone had come to the
32 conclusion that the AO Smith water heaters needed replacement, she wrote:

33 I talked to Jon [Sagecrest POA president Kalsbeek] about this last night, he said
34 **since this is an owner expense that I'll have to send something to the owners
35 and have them decide what they want to do.** If they want to replace all together

1 at the same time or do them once a month for example. Talking with Express
2 [plumbing] and Intermountain Gas they both said they firmly do not think this
3 should even be an option to the owner, that all AOSmith [sic] water heaters need
4 replaced regardless and they need replaced as soon as possible. If the owners
5 decide they do not wait to then they will have to sign a waiver basically stating that
6 if a tenant dies FRPM, Express & Intermountain Gas is not held liable for it.

7 Intermountain Gas wants to know what is being done NOW to prevent this from
8 happening tomorrow. I am delivering notices to all doors today. Express is going
9 out and buying a Carbon Monoxide tester today and will be out tomorrow testing
10 everyone's water heater to make sure there are no high readings.

11 My question is: Can we make the replacing of the water heaters mandatory or does
12 it have to be an option to the owners.

13 (Emphasis added.) Drost responded the next day:

14 Please let me know the results of the test. I am having a hard time believing that
15 we have to replace them and there is no acceptable retro available. But, I'll trust
16 the experts.

17 On July 29, 2011, Sheila Thomason, First Rate's maintenance supervisor, sent some
18 owners, including Kalsbeek, whose water heaters had high carbon monoxide readings an email
19 regarding the water heater and carbon monoxide problems. After explaining what had been
20 happening and the fact First Rate had begun replacing some of the water heaters, she wrote:

21 We are working on long term solutions so the same problem doesn't happen in
22 another 5 years. You will be notified once we have a solid plan. **Either way they
23 do need to be replaced for the safety of the tenants.** The initial design and
24 location of the water heaters was a poor choice on the builders [sic] end. We are
25 not replacing the water heaters with the same set up but we are looking at altering
26 the environment around them (per code) to guarantee longevity of the new water
27 heaters and safety of the tenants. I fully understand that this is a large expense.
28 Some of you have multiple water heaters that need to be replaced. Unfortunately
29 there isn't [sic] any other options. **As owners you are required to provide a safe
30 living environment.** Since there are a large amount of water heaters that need to
31 be replaced we are able to get a discount install of \$650 each. They have already
32 purchased 20 water heaters to lock in this rate. . . . We have attempted to collect
33 from the builders [sic] insurance company for multiple issues at the complex but
34 have been unsuccessful.

35 We will be contacting all of the tenants in danger letting them know we have
36 requested the water heater be replaced. . . .

37 **I will need a written response from each of you for documentation purposes. I
38 will also follow up with a phone call to ensure you have received and read this
39 email. Please let me know which building you own and if I have approval to**

1 **replace your water heater(s) listed.** If you prefer to use a different vendor I would
2 like that information with an approximate date to inform the tenant. . . .

3 (Emphasis added.) First Rate recognized that only the owner could approve installation of a new
4 water heater. It does not appear that at that time Switzer's Four Plex apartments had been flagged
5 as having dangerous carbon monoxide levels.

6 This email was copied to the Sagecrest POA officers. In response, on August 3, 2011,
7 Kalsbeek, Sagecrest POA president, wrote First Rate Drost:

8 Just to clarify, **the water heaters are interior items of each unit** and is **therefore**
9 **an owners [sic] choice on how to handle this situation**, *not* the POA. This makes
10 the costs for inspections and evaluations an owner may request, owner
responsibility.

11 This was discussed in depth with FRPM and Sheila.

12 (Emphasis added.) Drost, president of First Rate, replied:

13 Everyone understands that. As you have requested, FRPM is keeping the POA
14 informed of any major issues happening within the complex. Also, their [sic]
15 certainly will be savings for all if a common action/repair is made. IF [sic] we buy
16 100 water heaters at one time, we should be able to get them at a reduced price. If
we do them one at a time, cost [sic] will be more. We're just trying to
communicate as best we can.

17 On October 31, 2011, Switzer attended a Sagecrest POA Annual Meeting by telephone.
18 During that annual meeting the "smell of gas and water heater replacement" was discussed with
19 all of the owners, and Switzer learned about recommendations an engineer made after inspecting
20 the units. More particularly, the minutes provide as follows:

21 X. NEW BUSINESS:

22 ***

23 B. WATER HEATER AND A/C PROBLEMS=PRV'S:

24 President Jon Kalsbeek stated that the four part program has removed the
25 flooding problems. However, not all owners have had this work performed
26 and as a result, several floods occurred. Jon requested that FRPM [First
27 Rate] compile a list of all units that have had the work done to include an
updated price. As a reminder the proactive repairs which to date have
prevented any floods and the subsequent major costs associated to it are to:

- 28 1. Filters provided by POA and changed on a regular schedule
- 29 2. Install Freeze states in each unit
- 30 3. Install Pressure Regulator Valve per building

4. Replace Expansion tanks

C. SMELL OF GAS AND WATER HEATER REPLACEMENT

The POA hired a [sic] HVAC Engineer to inspect the units and make a recommendation at a cost of \$1,000. The engineer's recommendation was to:

1. Increase the fresh air intakes in wall for all floor plans
2. Replace the existing water heater with a different manufacturer that had side vents for floor plans A and B and C units as they fail for other reasons
3. Add louvers to the closet doors for C floor plans

President Kalsbeek requested FRPM [**First Rate**] to send a report showing which units have had the above work done. The list should show which units have had the work done as well as the name of the new water heater and current cost to include parts and labor.

It was requested that the Sagecrest Resident Managers test for CO at the time they are replacing the filters and notify the appropriate owner should there be concerns to discuss options.

Upon turnovers, Resident Managers are to encourage owners to replace the smoke detectors near the water heater area with a dual CO and smoke detector that hooks up to the current electrical plug with a battery as back up.

It was requested that FRPM send out a master list showing exactly which units have had what work done on them. Additionally, they would like a list of pricing and manufacturer and model number for all major appliances (refrigerators, stove, microwaves, dishwashers, washer and dryers) as some owners state that they were able to find them cheaper, which should not be the case. This list should include the pricing for Freeze stats [sic], PRV, expansion tank, water heater replacement, fresh air vent replacement, installation of louvers on closet doors, and cost of CO/smoke detectors. Also, include the cost to install the A/C condenser locks to protect from huffing?

Sagecrest POA Meeting, dated October 31, 2011.

On November 9, 2011, First Rate employee, Tara Gaertner, emailed Sagecrest owners, including Switzer, regarding a number of maintenance matters, including water heater and carbon monoxide concerns in several buildings at Sagecrest. That email that provided, in relevant part, as follows:

Attention Owners: . . .

1 Below are the recommendations from the HVAC engineer to solving the CO
2 problem in the units.

3 A. Increase the fresh air intakes for all floor plans by adding louvers to
4 the closet doors for ALL floor plans. \$187.50 per unit.

5 B. Replace existing water heater with one that has side vents for ALL
6 floor plans. \$650.

7 C. Replace the smoke detectors with CO/Smoke detector combination
8 sensor. \$62.48 per unit.

9 All of these recommended repairs are to help prevent the possibility of carbon
10 monoxide entering the unit. These recommendations come from a report obtained
11 by your association from a HVAC engineer evaluation.

12 Again, this work is highly recommended. **Please let me know what you would
13 like to have done and I can get that scheduled as soon as possible.**

14 (Emphasis added.) Switzer replied by email that same day, in relevant part, as follows:

15 11-9-11

16 Hi Tara,

17 I did not know we had a CO problem in the units. Would you let me know if
18 my water heaters have a pressure release valve? The older models don't, but newer
19 ones usually come with it. I'm not worried about a water heater with side vents due
20 to cost.

21 I appreciate the heads up on these preventative maintenance measures. I'm trying
22 to weigh costs vs benefits. Any help you can offer is appreciated. What is the
23 general consensus among the other owners?

24 Gaertner replied to Switzer's email stating "(a)ll of your water heaters checked in good during the
25 carbon monoxide detecting. We will be doing that again in November. I will let you know if there
26 are any problems."

27 Gaertner testified that she might have contacted Switzer by phone sometime on March 9,
28 2012, regarding high readings of carbon monoxide in Apartment 4624 but Switzer testified he
29 was not contacted. Switzer's phone records do not show any calls to or from a 208 area code in
30 the month of March, 2012.

31 First Rate's Gaertner began testing carbon monoxide levels in the apartments and
32 reporting those readings to both the respective owners and Sagecrest POA president Kalsbeek
when they were high. On March 9, 2012, Gaertner obtained high readings in some apartments and
First Rate replaced those water heaters.

1 On March 12, 2012, Intermountain Gas tested for carbon monoxide in apartment 4624 and
2 found 19 ppm carbon monoxide in the "flue" of the water heater but none outside in the ambient
3 air. Intermountain Gas indicated this was a normal reading. Intermountain Gas tested other
4 apartments where Gaertner had found "high" readings and determined the readings were normal.
5 First Rate halted replacing the water heaters. One of Kalsbeek's own apartments Gaertner tested
6 as high but Intermountain Gas found the levels were likewise normal. (Like other Sagecrest POA
7 board members, Kalsbeek owns a Four Plex building.)

8 Kalsbeek met with First Rate employees and developed a testing procedure for future
9 testing. The testing procedure was circulated to the other board members before adoption.
10 Sagecrest POA sent the procedures to the owners. Among other things, the procedures included
11 installing hardwired CO/fire detectors during preventative maintenance, turnovers, faulty fire
12 detector replacements, and during lease renewals.

13 In early 2012, First Rate posted a written notice on tenant doors, including Adra Kipper's
14 door, alerting them to the fact that there were higher levels of carbon monoxide escaping through
15 the vent on top of the water heater. That notice provided as follows:

16 **IMPORTANT!**

17 Upon our recent inspections of the water heaters at Sagecrest we have found that
18 your unit shows higher levels of carbon monoxide than we would like to see. The
19 carbon monoxide is exiting through the vent on the top of the water heater but does
20 have the potential of entering the unit. It is very important if you run your dryer to
21 keep the bi-fold doors open at all times. We have provided carbon monoxide
22 detectors for safety precautions until your water heater can be replaced next week.
23 Please read the instructions so it is properly placed in your apartment and you are
24 aware of how it operates. Please do not attach them to the walls since they will be
25 picked up once your water heater is replaced. The owner of your property has been
26 informed of the situation. They are scheduled for replacement starting on Monday
27 until the job is complete. Please also consider this your notice of intent to enter for
28 the replacement. We do not have a firm schedule of what units will be completed
29 when but are trying our best to do them quickly. If the carbon monoxide detector
30 goes off please open all windows and contact Intermountain Gas at 377-6840. For
31 extra safety precautions it wouldn't hurt to sleep with a couple windows open. If
32 you would like to shut your water heater off you may turn it to "vacation" but you
will not have hot water. Please call if you have any further questions or concerns.
Thank you for your understanding while we all work to get this matter resolved.

1 While at oral argument, Forbush plaintiffs argued that this warning indicated that it came from
2 Sagecrest POA, which is not true. The warning was printed on letterhead with the title "Sagecrest
3 Apartments" and nothing indicated Sagecrest POA. In addition, Kipper testified that she did not
4 know anything about a Sagecrest POA or any of its officers. She only dealt with First Rate.

5 First Rate provided the tenants with carbon monoxide detectors, but the detector in
6 Apartment 4624 did not work. As of November 10, 2012, the time of Forbush's death, the water
7 heater in Apartment 4624 had not been replaced.

8 Throughout the summer, First Rate continued to work on the problem. Sagecrest POA
9 directors asked to be kept in the loop but continued to maintain that this was an interior problem
10 needing Owner approval.

11 On October 10, 2012, another tenant's hardwired detector alerted and Intermountain
12 responded to her call and found dangerous levels of carbon monoxide. First Rate immediately
13 replaced her water heater.

14 On November 10, 2012, eighteen-year-old Private First-Class McQuen C. Forbush, who
15 was home on leave from the United States Marine Corps., and Breanna Halowell, who was also
16 eighteen at this time, stayed at the Sagecrest Apartments, Apartment 4624 as Kipper's invited
17 guests. Plaintiffs' Travis Forbush and Gretchen Hymas are Forbush's natural parents. On
18 November 10, 2012, Forbush died from carbon-monoxide poisoning. Halowell was holding
19 Forbush when he died and suffered severe injuries herself. It is undisputed that no one, including
20 Kipper, told Halowell or Forbush about possible carbon monoxide emissions, water heater
21 concerns or problems with the carbon monoxide detector related to Apartment 4624.
22 Forbush/Halowell sued Switzer, as the owner of the apartment and Sagecrest POA.

23 ANALYSIS

24 "On a motion for reconsideration, the court must consider any new admissible evidence or
25 authority bearing on the correctness of an interlocutory order. However, a motion for
26 reconsideration need not be supported by any new evidence or authority." *Fragnella v. Petrovich*,
27 153 Idaho 266, 276, 281 P.3d 103, 113 (2012) (internal citations omitted).

28 Both motions to reconsider involve summary judgment motions and, therefore, the
29 summary judgment standard applies to consideration of those motions. Summary judgment is
30

1 appropriate where “the pleadings, depositions, and admissions on file, together with the affidavits,
2 if any, show that there is no genuine issue as to any material fact and that the moving party is
3 entitled to a judgment as a matter of law.” *Beaudoin v. Davidson Trust Co.*, 151 Idaho 701, 704,
4 263 P.3d 755, 758 (2011), *quoting* I.R.C.P. 56(c). The burden is on the moving party to show that
5 no genuine issues of material fact exist. *Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730,
6 732 (2011), *citing* *Stoddart v. Pocatello Sch. Dist. No. 25*, 149 Idaho 679, 683, 239 P.3d 784, 788
7 (2010). Disputed facts are “liberally construed in favor of the nonmoving party and ‘all reasonable
8 inferences that can be drawn from the record are to be drawn in favor of the nonmoving party.’”
9 *Patterson v. State of Idaho, Dep’t of Health Welfare*, 151 Idaho 310, 315, 256 P.3d 718, 723
10 (2011), *quoting* *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066
11 (2008). “If reasonable people might reach a different conclusion from conflicting inferences based
12 on the evidence,” then the summary judgment motion must be denied. *Cramer v. Slater*, 146
13 Idaho 868, 873, 204 P.3d 508, 513 (2009), *citing* *Mackay*, 145 Idaho at 410, 179 P.3d at 1066.

14 Once the moving party establishes the absence of a genuine issue of fact, the burden shifts
15 to the nonmoving party to produce admissible evidence, which sets forth specific facts showing
16 the existence of a genuine issue of fact on the elements challenged by the moving party. I.R.C.P.
17 56(e); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720–21, 791 P.2d 1285, 1299–1300 (1990);
18 *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530–31, 887 P.2d 1034, 1037–38 (1994). An
19 opposing party may not merely rest on allegations contained in his pleadings nor may the
20 opposing party’s case rest on speculation or conclusory assertions. *Northwest Bec-Corp v. Home*
21 *Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002); *McCoy*, 120 Idaho at 769, 820 P.2d at
22 364. The party opposing the motion must produce evidence, by affidavit or otherwise, to show
23 that there is indeed a genuine issue for trial. I.R.C.P. 56(e); *Olsen*, 117 Idaho at 720, 791 P.2d at
24 1299.

25 It is against this legal background that the Court considers these two motions for
26 reconsideration.
27
28
29
30
31

1 A. **Switzer had a duty to warn tenant Kipper and whether the warning actually given**
2 **adequately advised Kipper of the danger created by the water heater is a jury**
3 **question.**

4 The Court previously ruled that Switzer had no duty to warn Forbush/Halowell. More
5 specifically, the Court ruled:

6 [O]nly the entity or person having control over the property (Adra Kipper) bears
7 the burden of warning social guests of dangerous conditions on the property.
8 *Robinson v. Mueller*, 156 Idaho at ___, 322 P.3d at 322. It is undisputed that both
9 Forbush and Halowell were social guests of the tenant, Adra Kipper. Therefore,
10 while Kipper had a duty to warn Forbush/Halowell, Switzer, as the landlord, has
11 no duty to warn Kipper's social guests. *Id.* Any claim based on a duty to warn fails.

12 Order Denying Switzer Summary Judgment, pgs. 9-10. However, upon further reflection, the
13 Court notified the parties it may have erred and indicated it would entertain reconsideration.

14 Forbush/Halowell support reconsideration and Switzer opposes. First Rate joins in
15 opposing reconsideration. The issue on reconsideration is narrow. The issue is whether Switzer,²
16 as the landowner and lessor, had a duty to warn Ms. Kipper, the tenant, about the water heater
17 safety problems and the carbon monoxide dangers.

18 If Switzer did not owe her a duty to warn her about the carbon monoxide dangers, then he
19 cannot be liable to Forbush/Halowell. However, if Switzer had that duty but failed to adequately
20 warn her, the issue becomes whether Switzer may be liable to Forbush/Halowell for any injuries
21 caused by that failure even though Forbush/Halowell were licensees.

22 The facts in this case are unique and Idaho Courts have never directly addressed the issue
23 of what duty a landlord owes a tenant's social guests where the landlord knows of a dangerous
24 condition, has an express contractual duty to repair that condition, but fails to warn the tenant or
25 the licensee about that danger.

26 As the parties acknowledge, any analysis begins with the *Robinson* and *Harrison* cases.
27 *See Harrison v. Taylor*, 115 Idaho 588, 595–96, 768 P.2d 1321, 1328–29 (1989); *Robinson v.*
28 *Mueller*, 156 Idaho 237, 240, 322 P.3d 319, 322 (Ct. App. 2014). It is well established that the
29 duties owed by owners, landlords and possessors of land depends on the status of the person
30 injured on the land – whether invitee, licensee, or trespasser. *Ball v. City of Blackfoot*, 152 Idaho

31 ² Throughout this discussion, the Court assumes that Switzer acted through its agent, First Rate.

1 673, 677, 273 P.3d 1266, 1270 (2012). Breanna Halowell and Travis Forbush were undeniably
2 social guests or licensees and, thus, Switzer's duties to them are defined by their status as social
3 guests. The Court of Appeals summarized the existing Idaho law on the duty owed to social
4 guests as follows:

5 A person who enters the property of another with passive permission or as a mere
6 social guest traditionally has been held to understand that he must take the land as
7 the possessor uses it. This entrant, classified by the law as a licensee, is expected to
8 be alert and to protect himself from the risks he encounters. Accordingly, the duty
9 owed to a licensee with respect to such risks is narrowly restricted. The possessor
10 is required simply to share his knowledge of dangerous conditions or dangerous
11 activities with the licensee. When such a warning has been given, the possessor's
12 knowledge is no longer superior to that of the licensee, and the possessor's duty
extends no farther. Of course, the possessor must avoid willful and wanton injury
to the licensee. But ordinary negligence allowing an unsafe condition or activity on
the property is insufficient, by itself, to impose liability to a licensee.

13 *Robinson*, 156 Idaho at 240, 322 P.3d at 322 (quoting *Keller v. Holiday Inns, Inc.*, 105 Idaho 649,
14 652–53, 671 P.2d 1112, 1115–16 (Ct. App. 1983), *vacated on other grounds*, 107 Idaho 593, 691
15 P.2d 1208 (1984)(emphasis added). However, “[a] landowner is only required to share with the
16 licensee knowledge of dangerous conditions or activities on the land.” *Id.* (citing *Evans v. Park*,
17 112 Idaho 400, 401, 732 P.2d 369, 370 (Ct. App. 1987)).

18 In *Robinson*, the landlord rented an apartment that included access onto the roof through a
19 recessed dormer and the dormer had no railings – an open and obvious danger. The landlord
20 actually warned the tenant about the lack of railings.

21 In September 2009, Robinson and the tenant met at a local bar. The two shared
22 drinks and then went to the tenant's apartment. Inside the bedroom, the tenant
23 opened the door to the dormer to let in cool air and to enjoy the view. The tenant
24 then went downstairs to retrieve an item from his car. During this time, Robinson
25 wrapped herself in a blanket and walked toward the recessed dormer. As Robinson
went through the doorway, she tripped and fell. Robinson rolled off the dormer and
onto the ground 12 feet below. As a result of the fall, Robinson broke her femur.

26 *Robinson*, 156 Idaho at 238, 322 P.3d at 320. There was no evidence in the *Robinson* decision that
27 the landlord had a contractual duty under the lease, or a statutory duty to install railings and the
28 court ruled he had not assumed a duty. In fact, the court further observed:

29 In the case at hand, Robinson presented evidence that the landlord had previously
30 made repairs to the carpet and the dormer door of the apartment. Although
31

1 Robinson maintains this established the landlord had a duty to make general
2 repairs to the premises, this does not equate to a duty to make the premises safe.
3 The condition at issue here—a recessed dormer—was not subject to the type of
4 repair or maintenance that Robinson contends the landlord was responsible for.
5 Rather, it was a feature of the property. Robinson does not predicate her claim on
6 the deficiency of any repair actually done by the landlord. Therefore, the landlord's
7 repair of the carpet and door do not establish a duty owed to Robinson, nor do they
8 create a genuine issue of material fact that would preclude summary judgment.

9 *Robinson*, 156 Idaho at 241, 322 P.3d at 323 (emphasis added). Finally, the Court of Appeals
10 held:

11 In the context at issue in this case—as between a tenant's social guest and the
12 landlord—the landlord owes a duty [to a tenant's social guest] only to the extent
13 that, if the landlord voluntarily undertakes repairs on the premises, the landlord
14 must exercise reasonable care in performing such repairs. However, the tenant
15 essentially occupies the position of landowner with respect to guests of the tenant.
16 This is because the tenant is the individual in control of the premises during the
17 lease and the tenant has control over the guests hosted in the apartment. There was
18 no evidence the landlord undertook maintenance or repairs of the dormer with
19 respect to any handrails. Thus, there was no duty owed to Robinson.

20 *Id.*

21 In *Harrison*, a business patron (invitee) tripped over a hole in the business' private
22 sidewalk. The patron sued the owner and lessor of the building. In relevant part, the Idaho
23 Supreme Court ruled, as to invitees (as opposed to social guests or licensees), both a landlord and
24 a tenant had a duty of ordinary care. Furthermore,

25 Either a tenant, or a landlord, or both, may be liable to a third party for injuries
26 resulting from negligent repairs or failure to repair. Even in the absence of a
27 specific lease provision, and with no controlling statute requiring him to make
28 repairs, if a landlord voluntarily undertakes repairs he is bound to use reasonable
29 and ordinary care or skill in the execution of the work. Similarly, a tenant or lessee,
30 having control of the premises is deemed, so far as third parties are concerned, to
31 be the owner, and in case of injury to third parties occasioned by the condition or
32 use of the premises, the general rule is that the tenant or lessee may be liable for
33 failure to keep the premises in repair.

34 *Harrison*, 115 Idaho at 596, 768 P.2d at 1329 (citation omitted) (emphasis added).

1 Neither case controls the analysis here. Unlike the landlords in *Robinson* or *Harrison*,
2 Switzer actually had an express contractual duty to repair the water heater.³ See Kipper-First Rate
3 Agreement, ¶39. In fact, arguably, Switzer also had a statutory requirement⁴ to repair it because of
4 the unreasonable risk the water heater carbon monoxide problems posed to harm anyone in that
5 apartment. In fact, the lease prohibited Kipper as the tenant, even if she knew about the dangers,
6 from repairing the water heater. *Id.* Switzer (through First Rate) had the sole authority and
7 responsibility to repair the water heater or to address the carbon monoxide problems. *Id.* Thus, the
8 facts before this Court distinguish it from both *Robinson* and *Harrison*.

9 In the absence of controlling Idaho authority, the Court has examined the relevant
10 restatements. While First Rate contends the Court cannot look to the restatements, Idaho appellate
11 courts have long applied numerous sections in the restatements. Moreover, where there is no
12 Idaho case law directly on point, it is not inappropriate to review and even consider other
13 jurisdiction's case law or the restatements. Therefore, the Court reviewed relevant portions of the
14 restatements and compared their analyses to existing Idaho case law. For example, the relevant
15 restatement potentially applying to these facts provides, in relevant part, as follows:

16 (1) A lessor of land who . . . fails to disclose to his lessee any condition, whether
17 natural or artificial, which involves unreasonable risk of physical harm to persons
18 on the land, is subject to liability to the lessee and others upon the land with the
19 consent of the lessee . . . for physical harm caused by the condition after the lessee
has taken possession, if

20 (a) the lessee does not know or have reason to know of the condition or the risk
21 involved, and

22
23 ³ The Court recognizes that, even if no contractual provision applied, there is also a dispute of fact whether Switzer
had undertaken repairs.

24 ⁴ I.C. § 6-320(3) provides that a landlord is required to maintain the premises in a manner that is not hazardous to the
25 health or safety of the tenant. The Idaho Supreme Court ruled in 2008 that this statute:

26 [E]stablishes a public policy that a landlord must maintain premises in a manner that is not
27 hazardous to the health or safety of the tenant. This Court relied upon I.C. § 6-320(a)(3) when it
28 adopted the rule that a landlord is under a duty to exercise reasonable care in light of all the
29 circumstances. [citations omitted] In essence, this Court concluded that the Legislature established a
policy for landlords to provide safe habitation for their tenants, separate and apart from the issue of
whether one may recover under the specific provisions of I.C. § 6-320. Certainly, it would not be
the public policy of the state to allow landlords to provide hazardous and unsafe premises to their
tenants.

30 *Jesse v. Lindsley*, 149 Idaho 70, 76, 233 P.3d 1, 7 (2008).

1 (b) the lessor knows or has reason to know of the condition, and realizes or
2 should realize the risk involved, and has reason to expect that the lessee will not
3 discover the condition or realize the risk.

4 RESTATEMENT (SECOND) OF TORTS § 358 (1965)(emphasis added). While this specific section has
5 not been considered or applied in Idaho, the Idaho Supreme Court cited an analogous section in
6 the same Restatement, Section 353,⁵ which applies to sellers of land, as authority in *Stephens v.*
7 *Stearns*, 106 Idaho 249, 678 P.2d 41, 48 (1984).⁶ This section is nearly identical to Section 358.

8 Therefore, by analogy, it is reasonable that Idaho courts would follow the same reasoning
9 and apply the RESTATEMENT (SECOND) OF TORTS § 358 to a lessor like Switzer. Contrary to First
10 Rate's arguments, Idaho case law does not preclude the Court from considering restatement
11 sections not adopted or case law from other jurisdictions in the absence of controlling Idaho law.
12 A jury could determine that Switzer (First Rate) knew or should have known about the carbon
13 monoxide problems and the need to replace the water heater and need to install carbon monoxide
14 detectors. Especially given the facts, a jury could determine that Switzer knew this presented an
15 unreasonable risk to anyone in that apartment.

16 Furthermore, numerous other sections in the RESTATEMENT (SECOND) OF TORTS similarly
17 recognize a lessor's duty to disclose or warn lessees of dangerous conditions and to repair those
18 conditions. In fact, several find the failure to warn the tenant or to repair a dangerous condition
19 results in liability to licensees. For example, Section 361 provides in relevant part as follows:

20 A possessor of land who leases a part thereof and retains in his own control any
21 other part which is necessary to the safe use of the leased part, is subject to liability

22 ⁵ The section provides in relevant part:

23 (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural
24 or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the
25 vendee and others upon the land with the consent of the vendee or his subvendee for physical harm
26 caused by the condition after the vendee has taken possession, if

27 (a) the vendee does not know or have reason to know of the condition or the risk involved, and

28 (b) the vendor knows or has reason to know of the condition, and realizes or should realize the
29 risk involved, and has reason to believe that the vendee will not discover the condition or realize
30 the risk.

31 RESTATEMENT (SECOND) OF TORTS § 353 (1965).

32 ⁶ "We agree that Koch, as a vendor, did not owe a duty to plaintiff since the lack of the handrail was known to both
33 defendant Stearns, the vendee/landlord, and plaintiff. See RESTATEMENT (SECOND) OF TORTS §§ 352-353 (1965)."
Stephens v. Stearns, 106 Idaho 249, 256, 678 P.2d 41, 48 (1984).

1 to his lessee and others lawfully upon the land with the consent of the lessee . . .
2 for physical harm caused by a dangerous condition upon that part of the land
3 retained in the lessor's control, if the lessor by the exercise of reasonable care

4 (a) could have discovered the condition and the risk involved, and

5 (b) could have made the condition safe.

6 RESTATEMENT (SECOND) OF TORTS § 361 (1965). The Idaho Supreme Court cited this section as
7 authority in *Keller v. Holiday Inns, Inc.*, 105 Idaho 649, 658-59, 671 P.2d 1112, 1121-22 (Ct.
8 App. 1983) decision reviewed, 107 Idaho 593, 691 P.2d 1208 (1984). Admittedly, the injured
9 parties were invitees.

10 Sections 360-61 provide further exceptions where the lessee is allowed to use
11 parts of the property which are retained under the lessor's control. See also W.
12 PROSSER, HANDBOOK OF THE LAW OF TORTS, § 63, at 405-08 (4th ed. 1971).
13 These exceptions plainly apply to the hallway where the security gates were kept.

14 *Id.* In this case, Switzer expressly retained the right to enter the premises to repair conditions,
15 including the water heater, at any time, and restricted Ms. Kipper's right to either prevent his
16 entry or to repair the water heater herself. See Kipper-First Rate Lease Agreement, ¶39. The
17 comment section to RESTATEMENT (SECOND) OF TORTS § 361 clarifies:

18 a. The rule stated in this Section applies irrespective of whether the lessee or his
19 licensees coming in his right upon that part of the land leased to him, know or
20 could, by the exercise of reasonable care, discover the dangerous condition
21 maintained by the lessor upon that part of the land maintained within his own
22 control. As to the effect of the knowledge of the lessee and others entering upon
23 the land with his consent, see § 360, Comment a.

24 b. The rule stated in this Section applies to the maintenance of walls, roofs, and
25 foundations of an apartment house or office building. It applies also to any other
26 part of the land the careful maintenance of which is essential to the safe use of the
27 rooms or offices or portion of land leased to the various lessees, such as the central
28 heating, lighting, or water system.

29 c. If an apartment or office can be safely used only if heat or light is provided and
30 the terms of the lease require the lessor to provide such a service, the lessor is
31 subject to liability for bodily harm caused by a failure to exercise reasonable care
32 to maintain such a service, not only to the lessee but also to those upon the land
33 with the consent of the lessee.

34 *Id.* Likewise, the RESTATEMENT (SECOND) OF TORTS § 357 provides:

1 A lessor of land is subject to liability for physical harm caused to his lessee and
2 others upon the land with the consent of the lessee . . . by a condition of disrepair
3 existing before or arising after the lessee has taken possession if:

- 4 (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to
5 keep the land in repair, and
6 (b) the disrepair creates an unreasonable risk to persons upon the land which
7 the performance of the lessor's agreement would have prevented, and
8 (c) the lessor fails to exercise reasonable care to perform his contract.

9 RESTATEMENT (SECOND) OF TORTS § 357 (1965). Switzer agreed to keep the premises in repair.

10 The RESTATEMENT (THIRD) OF TORTS § 53 would impose:

11 (c) a duty to disclose to the lessee any dangerous condition that satisfies all of the
12 following:

- 13 (1) it poses a risk to entrants on the leased premises;
14 (2) it exists on the leased premises when the lessee takes possession;
15 (3) it is latent and unknown to the lessee; and
16 (4) it is known or should be known to the lessor.

17 RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 53 (2012).⁷ Arguably, the dangerous
18 condition pre-existed Kipper's lease.

19 The RESTATEMENT OF PROPERTY, LANDLORD & TENANT, also addresses similar fact
20 patterns.⁸ However, Idaho has not adopted or considered the specific sections identified by the
21 Court or Forbush/Halowell.⁹

22 ⁷ The Idaho Supreme Court relied on a different section in the RESTATEMENT (THIRD) OF TORTS in *Mortensen v.*
23 *Stewart Title Guar. Co.*, 149 Idaho 437, 447, 235 P.3d 387, 397 (2010).

24 ⁸ RESTATEMENT (SECOND) OF TORTS § 357 is a companion section to RESTATEMENT (SECOND) OF PROPERTY, LAND,
& TEN. § 17.5.

25 A landlord is subject to liability for physical harm caused to the tenant and others upon the leased
26 property with the consent of the tenant . . . by a condition of disrepair existing before or arising after
the tenant has taken possession if:

- 27 (1) the landlord, as such, has contracted by a promise in the lease or otherwise to keep the leased
28 property in repair;
29 (2) the disrepair creates an unreasonable risk to persons upon the leased property which the
30 performance of the landlord's agreement would have prevented; and
31 (3) the landlord fails to exercise reasonable care to perform his contract.

32 RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 17.5 (1977). The Restatement continues:

1 The Court finds that these sections are consistent with *Robinson*. In *Robinson*, the
2 landowner/lessor had not contractually obligated himself to repair conditions on the premises. The
3 *Robinson* court relied on and quoted from *Harrison*:

4 Second, tenants are held responsible as if they were the owner with respect to third
5 parties. However, the landlord can still be liable in limited circumstances.
6 [footnote omitted] A landlord generally is not “responsible for injuries to third
7 persons in privity with the tenant which are caused by failure to keep or put the
8 demised premises in good repair.”

9 *Robinson*, 156 Idaho at 240, 322 P.3d at 322 (emphasis added). In other words, both the *Robinson*
10 and *Harrison* courts make clear that the circumstances in those cases imposing liability are not the

11 A landlord who leases a part of his property and retains in his own control any other part the tenant
12 is entitled to use as appurtenant to the part leased to him, is subject to liability to his tenant and
13 others lawfully upon the leased property with the consent of the tenant or a subtenant for physical
14 harm caused by a dangerous condition upon that part of the leased property retained in the
15 landlord's control, if the landlord by the exercise of reasonable care could have:

- 16 (1) discovered the condition and the unreasonable risk involved therein; and
17 (2) made the condition safe.

18 RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 17.3 (1977)

19 A landlord who leases a part of his property and retains in his own control any other part necessary
20 to the safe use of the leased part, is subject to liability to his tenant and others lawfully upon the
21 leased property with the consent of the tenant or a subtenant for physical harm caused by a
22 dangerous condition upon that part of the property retained in the landlord's control, if the landlord
23 by the exercise of reasonable care could have:

- 24 (1) discovered the condition and the risk involved; and
25 (2) made the condition safe.

26 RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 17.4 (1977)

27 A landlord is subject to liability for physical harm caused to the tenant and others upon the leased
28 property with the consent of the tenant or his subtenant by a dangerous condition existing before or
29 arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the
30 condition and the existence of the condition is in violation of:

- 31 (1) an implied warranty of habitability; or
32 (2) a duty created by statute or administrative regulation.

33 RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 17.6 (1977).

34 ⁹ Idaho Appellate courts cited with approval to the RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT.
35 See *Stephens v. Stearns*, 106 Idaho 249, 258, 678 P.3d 41, 50 (1984) (relying on the Restatement to determine the
36 modern trend in the law; adopting the modern trend that a landlord is under a duty to exercise reasonable care in light
37 of all of the circumstances); *George W. Watkins Family v. Messenger*, 115 Idaho 386, 389-390, 766 P.2d 1267, 1270-
38 71 (Ct. App. 1988) (citing to RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT §§ 6.1, 6.2 and 16.1
39 (1977)).

1 only circumstances under which a lessor/landlord may be liable. In fact, in a footnote, the
2 *Harrison* court reiterated that circumstances where a landlord could be liable to a third party are
3 not limited to those identified in *Harrison*.

4 While the circumstances where a landlord could be liable to a third party may not
5 exclusively be limited to those set forth in *Harrison*, the quoted passage makes
6 clear that the duty of a landlord to third parties is not one of reasonable care under
7 the circumstances. If it were, there would be no reason to delineate a very narrow
8 set of circumstances illustrating how landlords could be liable.

8 *Id.* (emphasis added).

9 In *Robinson*, the lessor had no contractual obligation to repair the condition, and the tenant
10 knew about the condition. Here, multiple disputes of material facts exist precluding summary
11 judgment to Switzer on the issue of whether Switzer had a duty to warn. In addition, Switzer
12 through his agent, First Rate, did warn Kipper. If a jury finds the warning adequate, Switzer has
13 no liability to Forbush/Halowell for a failure to warn.

14 For example, the comments to section 17.1 of the RESTATEMENT (SECOND) OF PROPERTY,
15 LAND. & TEN. state:

16 The liability of the landlord to those on the leased property with the consent of the
17 tenant is the same as it is to the tenant. Where the landlord has warned the tenant
18 of the existence of any latent defects, he is not responsible for injury to anyone
19 visiting the tenant. However, where the landlord has not warned the tenant, he is
20 subject to liability for injury caused by the latent defect to any social or business
21 guests of the tenant or to members of the tenant's family.

22 RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 17.1 (1977) (comment g).

23 Therefore, the Court grants reconsideration and denies partial summary judgment to
24 Switzer on this basis. The rest of its previous decision remains unchanged.

25 **B. Sagecrest POA had no duty to Forbush/Halowell and the Court grants summary**
26 **judgment to Sagecrest POA.**

27 Sagecrest POA moved the Court to reconsider its previous order denying summary
28 judgment. Forbush/Halowell, First Rate and Switzer opposed reconsideration.

29 Forbush/Halowell allege Sagecrest POA breached its duty of care owed to
30 Forbush/Halowell, based on their claim that Sagecrest POA failed to repair or replace the water
31 heater located within Apartment 4624 and failed to install carbon monoxide detectors.

1 In order to succeed on their negligence claims against Sagecrest POA, Forbush/Halowell
2 must establish that it had a duty, recognized by law, requiring it to conform to a certain standard
3 of conduct and that it breached that duty. *Robinson*, 156 Idaho at 239, 322 P.3d at 321. They also
4 must establish a causal connection between Sagecrest POA's conduct and their resulting injuries
5 and that they suffered an actual loss or damage. *Id.* Generally, determining whether a duty exists
6 is a question of law. *See, Udy v. Custer Cnty.*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001);
7 *Robinson*, 156 Idaho 237, 322 P.3d 319.

8 Not every person or entity owes a tort duty to everyone else in all circumstances. *Boots ex*
9 *rel. Boots v. Winters*, 145 Idaho 389, 393-94, 179 P.3d 352, 356-57 (Ct. App. 2008) (citing
10 *Turpen v. Granieri*, 133 Idaho 244, 247-48, 985 P.2d 669, 672-73 (1999). "Absent unusual
11 circumstances, a person has no duty to prevent harm to another, regardless of foreseeability."
12 *Beers v. Corp. of Pres. of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 686, 316
13 P.3d 92, 98 (2013).

14 The Court finds, as a matter of law, Sagecrest POA owed no duty to Forbush/Halowell.
15 The Court reconsiders its earlier decision and grants its summary judgment based on the
16 following.

- 17 **1. The CC&Rs do not authorize Sagecrest POA to replace the water heater or**
18 **install carbon monoxide detectors in apartment 4624 or to order their**
19 **installation or replacement even in an emergency.**

20 The Sagecrest complex CC&R's clearly define both Sagecrest POA's responsibilities and
21 authorities and the individual building owner's responsibilities and authorities. Covenants, like
22 these CC&Rs, that restrict the uses to which a party may use his or her property are valid and
23 enforceable. *Nordstrom v. Guindon*, 135 Idaho 343, 17 P.3d 287, 290 (2000). In construing a
24 restrictive covenant, the Court generally applies the same rules of construction as are applied to
25 any contract. *Id.* Whether covenants are ambiguous is a question of law for the Court. *Id.*
26 Furthermore, where a covenant is clear and unambiguous, its interpretation is also a question of
27 law. *Id.* In this case, the Court finds that the covenants at issue, are clear and unambiguous; thus,
28 their construction is a question of law.

29 Applying the clear language of the CC&Rs, the Court finds that only the individual Four
30 Plex owners control their respective Four Plexes. Only the owners are responsible for maintaining
31

1 and repairing the interior areas of their respective Four Plexes and individual residential units.
2 CC&Rs, ¶3.3A. They are further responsible, to a limited extent, for exterior areas they control,
3 like the windows on their respective units. Thus, only Switzer can determine whether a new water
4 heater is installed or repaired or whether carbon monoxide detectors are installed. Under the
5 CC&Rs, Sagecrest POA only controls the exterior areas and is responsible for exterior
6 maintenance and repair only. *See* CC&Rs, ¶3.3.

7 Forbush/Halowell and First Rate argue that in an emergency, Sagecrest POA had authority
8 to enter the individual apartments. However, construing the following excerpts from the CC&Rs
9 makes clear that is not the case:

10 3.3 Maintenance of Lots and Four Plexes.

11 A. The Association shall maintain the following:

- 12 1. The following portions of the **exterior** of each Four Plex: ...
13 including the entry way, exterior stairs, railings and decks, and
14 roofs.
- 15 2. All Sidewalks on the Property.
- 16 3. All landscaping on the Property, including, without limitation, all
17 grass areas, shrubs, trees and bushes that are on Residential Lots
18 and the Recreational Center Lot, and all planters, whether they are
19 on Residential Lots or in the Common Areas.
- 20 4. Drainage Facilities, including the Drainage Lot.
- 21 5. The Common Areas.
- 22 6. Any perimeter fence.
- 23 7. The main lines, service lines, valves, and sprinkler heads of the
24 PUIS [pressurized irrigation system] on the Property to the extent
25 that they are not maintained by the Nampa Irrigation District.

26 B. The Owner shall maintain the following:

- 27 1. The following portions of the **exterior of the each Four Plex**:
28 windows, doors, exterior air conditioning units and all other
29 exterior maintenance not performed by the Association; and
- 30 2. The **entire interior of the Four Plexes, including but not limited**
31 **to** flooring, ceilings, walls and wall coverings, **appliances,**
32 **plumbing and plumbing fixtures, electrical system and fixtures,**
33 **all interior components of the heating and air conditioning**
34 **system.**

3.5 Owner's Right with Respect to Interiors: Each Owner shall have the **exclusive** right to ..., repair, ... or otherwise maintain, ... the **interior** portions of their Four Plex,

3.6 Easements for Access for Repair, Maintenance: The Association is hereby granted an irrevocable easement for purposes of access to and upon each Residential Lot and Four Plex, during reasonable hours and as necessary for the maintenance and repair of the Residential Lot and Four Plex thereon.

3.8 Failure of Owner to Maintain such Owner's Residential Lot or Four Plex:
In the event the Owner of any Residential Lot improved with a Four Plex shall fail to maintain any portion of such Owner's Residential Lot that **Owner is responsible to maintain**, in a manner reasonable [sic] satisfactory to the Board, after approval by vote of at least sixty percent (60%) of the members of the Board present and voting and subject to such Owner's right to notice and a hearing before the Board, the Association may, through its agents and employees, enter upon the Residential Lot or Four Plex and repair, maintain and restore the Residential Lot, or the Four Plex.

ARTICLE IX.

RESERVED EASEMENTS

9.3 Maintenance Easement: An easement is hereby reserved to Declarant [Sagecrest Development LLC or its successor] and any member of the Board of Directors [of the Sagecrest POA] or Manager, and their respective officers, agents, employees and assigns, upon, across, over, in and under the Property and a right to make such use of the Property as may be necessary or appropriate to make emergency repairs or to perform the duties and functions which the Association is obligated or permitted to perform, including but not limited to the following: the right to enter upon any Residential Lot and the **exterior** of any Four Plex for the purpose of performing repairs and maintenance to such Residential Lot or Four Plex, as provided herein; and the right to enter upon any Residential Lot to perform landscaping services, and to install, repair and maintain the PUIS [pressurized irrigation system].

CC&Rs (emphasis added). The CC&Rs define the terms “Four Plex,” “Residential Lots” and “Property.” the CC&Rs define “Four Plex” as “a residential building on each Residential Lot of the Property that is comprised of four separate single family residential units.” *See* CC&Rs, Article II, Definitions. They define “Residential Lots” as “all Lots on the Multi Family Portion of the Plat, except the Recreational Center Lot, the Driving and Parking Lot, and the Drainage Lot.” *Id.* “Property” is defined as “the real property described in Exhibit A.” *Id.*

1 None of the provisions permit Sagecrest POA to repair or replace or order First Rate to
2 repair or replace anything inside the Four Plex residential units. Sagecrest POA can only make
3 emergency repairs on exterior areas; i.e., the Residential Lot or the exterior of the Four Plex. *See*
4 CC&Rs, ¶¶3.8 and 9.3. It can perform “repairs and maintenance to such Residential Lot or Four
5 Plex.” *Id.* The definitions of Residential Lot and Four Plex clearly describe only exterior areas.

6 B. The Owner shall maintain the following:

- 7 1. The following portions of the exterior of the each Four Plex: windows,
8 doors, exterior air conditioning units and all other exterior maintenance not
9 performed by the Association

10 CC&Rs, ¶3.3 (B) (emphasis added). Paragraph 3.8 reads, in relevant part, as follows:

11 3.8 Failure of Owner to Maintain such Owner’s Residential Lot or Four Plex:
12 In the event the Owner of any Residential Lot improved with a Four Plex shall fail
13 to maintain any portion of such Owner’s Residential Lot that the Owner is
14 responsible to maintain, in a manner reasonable [sic] satisfactory to the Board,
15 after approval by vote of at least sixty percent (60%) of the members of the Board
16 present and voting and subject to such Owner’s right to notice and a hearing before
the Board, the Association may, through its agents and employees, enter upon the
Residential Lot or Four Plex and repair, maintain and restore the Residential Lot,
or the Four Plex.

17 CC&Rs, ¶3.8 (emphasis added). When ¶3.8 is read together with ¶3.3 (B), it is clear that any
18 emergency repairs Sagecrest POA is authorized to make are limited to the areas exterior to the
19 apartments and only then by sixty percent vote.

- 20 2. **The Court wrongly held that the CC&Rs, ¶6.7(A)5(e), authorized the**
21 **Sagecrest POA to interfere with First Rate’s management of the carbon**
22 **monoxide issues.**

23 On October 30, 2014, the Court orally ruled that CC&Rs, ¶6.7(A)5(e), authorized the
24 Sagecrest POA to control First Rate’s management of the carbon monoxide issues. The Court
25 erred. When read as a whole, the CC&Rs do not authorize Sagecrest POA to interfere with First
26 Rate’s management of individual owner’s Four Plex. That section reads as follows:

27 **Safety and Security:** Each owner and occupant of a Four Plex unit, and their
28 respective guests and invitees, shall be responsible for their own personal safety
29 and the security of their property in the Village. The Association may, but shall not
30 be obligated to maintain or support certain activities within the Property designed
31 to enhance the level of safety or security which each person provides for himself
and his property. Neither the Association nor Declarant shall in any way be
considered insurers or guarantors of safety or security within the Property, nor

1 shall either be held liable for any loss or damage by reason of failure to provide
2 adequate security or ineffectiveness of security measures undertaken.

3 CC&Rs, ¶6.7(A)5(e).

4 First, the plain language places the responsibility upon owner-lessors, lessees, and lessee
5 guests for their own personal safety and security of their property. Second, while Sagecrest POA
6 may augment safety and security, it does not insure or guarantee that safety and security and is not
7 liable for any loss or damage caused by the inadequacy of those measures.

8 As noted by Sagecrest POA, the CC&Rs cannot and do not give it authority to take any
9 action within the individual unit interiors because those units are privately owned and the owner
10 has exclusive authority. *See* CC&Rs, ¶3.5. Only the unit owner can impart that authority to
11 Sagecrest POA. *Id.* There is no evidence that ever happened.

12 **3. The First Rate-Sagecrest POA agreement did not authorize First Rate to**
13 **replace the water heater or install carbon monoxide detectors in apartment**
14 **4624 or to order their installation or replacement without the Owner**
Switzer's consent.

15 Sagecrest POA contracted with First Rate to manage the day-to-day **exterior** maintenance
16 and repair. The First Rate-Sagecrest POA Agreement can only give First Rate the authority and
17 control the Sagecrest POA has, which does not include the apartment interior. In addition to the
18 First Rate-Sagecrest POA Agreement, First Rate also contracted with Switzer, the owner of
19 Building 46, to manage and maintain Switzer's apartment interiors, including Apartment 4624.
20 The parties frequently confuse this division of authority because both Switzer, the Owner of
21 Apartment 4624, and Sagecrest POA contracted with First Rate to act as their agent. However,
22 they forget that First Rate can only act within each principle's respective authority. Moreover, the
23 Sagecrest POA president, Kalsbeek, as an owner, also individually contracted with First Rate as
24 well to act as his individual agent.

25 The First Rate-Switzer Agreement allowed First Rate to make ordinary repairs and
26 replacements reasonably necessary to preserve and maintain the exterior and interior of Switzer's
27 units in an attractive condition and state of good repair. By agreement, First Rate did not need
28 Switzer's approval to replace or repair interior things when the cost was below \$250.00.
29 However, First Rate needed Switzer's approval for any actions, including repairs, exceeding
30 \$250.00.

1 **4. Tenant Kipper is not a third party beneficiary of the Sagecrest POA-First**
2 **Rate Agreement, Paragraph 3.4.**

3 Switzer also argues the tenant, Kipper, is the third party beneficiary of the Sagecrest POA-
4 First Rate Agreement, ¶3.4, creating dispute of fact regarding privity of the contract precluding
5 summary judgment. The Court disagrees.

6 Idaho Code § 29-102 provides that “[a] contract, made expressly for the benefit of a third
7 person, may be enforced by him at any time before the parties thereto rescind it.” However, the
8 RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) provides:

9 (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a
10 promise is an intended beneficiary if recognition of a right to performance in the
11 beneficiary is appropriate to effectuate the intention of the parties and either

12 (b) the circumstances indicate that the promisee intends to give the
13 beneficiary the benefit of the promised performance.

14 (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

15 In addition, Idaho case law clearly establishes, that “[t]he test for determining a party's
16 status as a third-party beneficiary ... is whether the agreement reflects an intent to benefit the third
17 party.” *Idaho Power Co. v. Hulet*, 140 Idaho 110, 112, 90 P.3d 335, 337 (2004). The third party
18 must show “that the contract was made for his direct benefit, or as sometimes stated primarily for
19 his benefit, and that it is not sufficient that he be a mere incidental beneficiary.” *Dawson v.*
20 *Eldredge*, 84 Idaho 331, 337, 372 P.2d 414, 418 (1962) (quoting *Sachs v. Ohio Nat'l Life Ins. Co.*,
21 148 F.2d 128, 131 (7th Cir.1945)). “[T]he contract itself must express an intent to benefit the
22 third party.” *Adkison Corp. v. American Bldg. Co.*, 107 Idaho 406, 409, 690 P.2d 341, 344
23 (1984).” *Fenwick v. Idaho Dept. of Lands*, 144 Idaho 318, 323, 160 P.3d 757, 762 (2007); *see*
24 *also Partout v. Harper*, 145 Idaho 683, 688, 183 P.3d 771, 776 (2008).

25 Therefore, the Court first examines the Sagecrest POA-First Rate Agreement to determine
26 whether it indicates that when the parties entered it, they intended it be for Kipper's benefit. The
27 Sagecrest POA-First Rate Agreement, ¶3.4, provides:

28 **3.0 DUTIES OF AGENT** [First Rate]

...

29 3.4 Take such action as AGENT deems reasonable and appropriate in the event
30 of any emergency brought to AGENT's attention which may result in damage to
31 the property or cause injury to tenants and occupants of the Property.

1 Notwithstanding this authority, it is understood and agreed that AGENT will if
2 at all possible, confer immediately with the President, or other authorized
3 officer of the ASSOCIATION regarding all emergency repairs in excess of
\$300.00 without first obtaining approval of the ASSOCIATION.

4 There is nothing in the agreement that indicates that Kipper or any other tenant was an
5 intended beneficiary. The agreement clearly indicates that it is for the mutual benefit of the
6 Sagecrest POA and First Rate. There is no dispute of fact.

7 **5. Sagecrest POA did not modify its agreement with First Rate.**

8 Forbush/Halowell, First Rate and Switzer argue that Sagecrest POA modified the
9 Sagecrest POA-First Rate Agreement, either orally or by conduct, changing its duties to Sagecrest
10 tenants. They argue that Sagecrest POA board's actions assumed responsibility for "global" issues
11 affecting the entire complex. The Court disagrees. In making its argument, Switzer identified
12 Sagecrest POA-First Rate Agreement, ¶3.4. That provision provides as follows:

13 **3.0 DUTIES OF AGENT** [First Rate]

14 . . .
15 3.4 Take such action as AGENT deems reasonable and appropriate in the event
16 of any emergency brought to AGENT's attention which may result in damage to
17 the property or cause injury to tenants and occupants of the Property.
18 Notwithstanding this authority, it is understood and agreed that AGENT will if
19 at all possible, confer immediately with the President, or other authorized
officer of the ASSOCIATION regarding all emergency repairs in excess of
\$300.00 without first obtaining approval of the ASSOCIATION.

20 However, Switzer's argument completely ignores the fact that this agreement with First Rate
21 cannot enlarge the sphere of Sagecrest POA's authority and responsibility as defined in the
22 CC&Rs. This section must be construed within the entirety of the agreement.

23 If the terms of a contract are clear and unambiguous, the interpretation of the contract's
24 meaning is a question of law. *E.g., Ada County Assessor v. Taylor*, 124 Idaho 550, 553, 861 P.2d
25 1215, 1218 (1993). If, on the other hand, the terms of a contract are ambiguous, the interpretation
26 of that contract's meaning is a question of fact. *Id.*; *Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d
27 1342, 1346 (1992). "The initial inquiry into whether a ... legal instrument is ambiguous presents a
28 legal question, over which this court exercises free review." *Chubbuck v. City of Pocatello*, 127
29 Idaho 198, 201, 899 P.2d 411, 414 (1995); *see also Dr. James Cool, D.D.S. v. Mountainview*
30 *Landowners Co-op. Ass'n, Inc.*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2004). "An instrument
31

1 which is reasonably subject to conflicting interpretation is ambiguous.” *Latham v. Garner*, 105
2 Idaho 854, 858, 673 P.2d 1048, 1052 (1983). “The legal effect of an unambiguous written
3 document must be decided by the trial court as a question of law.” *Id.* at 857, 673 P.2d at 1051.

4 In order to determine whether the contract between Sagecrest POA and First Rate is
5 ambiguous, this Court first determines whether the terms of that contract are reasonably
6 susceptible to conflicting interpretations. *Id.* When read as a whole, the Court finds this contract is
7 clear and unambiguous and is not susceptible to conflicting interpretations. Both First Rate and
8 Switzer remove isolated sections out of the agreement and attempt to infuse them with tortured
9 constructions.

10 The interpretation and legal effect of an unambiguous contract are questions of law. *See*
11 *Hanks v. Sawtelle Rentals, Inc.*, 133 Idaho 199, 202–03, 984 P.2d 122, 125–26 (1999); *First*
12 *Security Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 791, 964 P.2d 654, 658 (1998). In
13 construing a written instrument, the Court must consider it as a whole and give meaning to all
14 provisions of the writing to the extent possible. *See Magic Valley Radiology Associates, P.A. v.*
15 *Professional Business Services, Inc.*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991).

16 In construing this section, it is clear that it is not enlarging Sagecrest POA’s authority; it
17 simply authorizes and imposes a duty on First Rate to take emergency action (up to \$300 without
18 approval) to address any problem that could damage the exterior and common areas of the
19 property to cause injury to the tenants or others. But this authority is clearly limited to those areas
20 controlled by Sagecrest POA. It does not authorize actions within the interior of the residential
21 units in the individually owned Four Plexes. It does not change the clear division of
22 responsibilities and authorities between the individual owners and Sagecrest POA.

23 In an attempt to avoid its responsibilities, First Rate tries to argue that Sagecrest POA
24 modified ¶3.4. For example, Tony Drost, First Rate president, testified:

25 Q. Do you believe Section 3.4 changed in such a way that you did not have to
26 confer with Mr. Kalsbeek if at all possible but were required to go through him
27 with regard to health and safety in emergent situations?

28 A. Yes, sir.

29 Q. Do you believe that Section 3.4 was amended – whether it’s through
30 emails, oral communications by Mr. Kalsbeek, written communications by Mr.
31 Kalsbeek – that if there was a disagreement with regard to health and safety in an

emergent situation, that Kalsbeek's decision would override First Rate's recommendations?

A. I believe it's safe to say that it prevailed in most cases, but I don't know if it prevailed in all cases.

Drost Dep. pg. 236 and 334.

However, these arguments ignore the clear language of the agreement precluding such modifications. The Sagecrest POA-First Rate agreement specifically provides in relevant part as follows:

10.0 ENTIRE AGREEMENT

This AGREEMENT contains the entire agreement between the parties hereto, and supersedes all prior negotiations and agreements, whether written or oral. No modifications or amendments hereto shall be of any force or effect, unless in writing and executed by both AGENT and ASSOCIATION.

Sagecrest POA-First Rate Agreement, ¶10.0 (emphasis added). Neither party could modify the contract without placing it in writing and First Rate could not unilaterally modify the contract. *See, City of Meridian v. Petra Inc.*, 154 Idaho 425, 436, 299 P.3d 232, 243 (2013) (An agreement that allows for modifications only in writing signed by both parties can only be modified by agreement signed by both parties.)

Neither Switzer nor First Rate produced any written agreement to modify the Sagecrest POA-First Rate Agreement. Thus, there is no modification that complies with the express terms of the agreement. *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 717, 330 P.3d 1067, 1075 (2014); *Watkins Co., LLC v. Storms*, 152 Idaho 531, 535-36, 272 P.3d 503, 507-08 (2012).

While the Idaho Supreme Court recognizes "The fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of a change proposed by the other." *Ore-Ida Potato*, 83 Idaho at 296, 362 P.2d at 387. However, without a meeting of the minds, the conduct of the parties cannot establish a modification. *Watkins*, 152 Idaho at 536, 272 P.3d at 508. The *Watkins* case is instructive. As the Supreme Court observed:

In *Watkins*, a lease between the parties provided that "each party specifically waives the right to a jury trial," and contained a clause dictating that the lease

1 could only be modified by a writing signed by both parties. 152 Idaho at 535, 272
2 P.3d at 507. Despite this, when a dispute arose, both parties demanded a jury trial
3 in their pleadings. *Id.* Then, four weeks before trial, the plaintiffs filed a motion to
4 enforce the jury-waiver clause. *Id.* The defendants argued that the clause had been
5 modified by mutual consent through each party's conduct of requesting a jury trial.
6 *Id.* This Court upheld the district court's conclusion that there was no modification
7 of the lease and that the jury-waiver clause was enforceable. *Id.* We noted first that
8 there was no modification that complied with the lease as there was no written
9 agreement to modify signed by both parties. *Id.* Further, we explained that,
10 regardless of the parties' conduct, there must be a meeting of the minds as to the
11 proposed modification. *Id.* at 536, 272 P.3d at 508. Without any evidence that the
12 parties mutually agreed to modify the jury-waiver clause of the lease, their
13 independent conduct was insufficient to demonstrate modification. *Id.*

14 *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 717-18, 330 P.3d 1067,
15 1075-76 (2014) (emphasis added).

16 Here, like *Watkins* and *Pocatello Hospital*, the Sagecrest POA-First Rate Agreement
17 contained a provision which stated that “No modifications or amendments hereto shall be of any
18 force or effect, unless in writing and executed by both AGENT and ASSOCIATION.” The parties
19 never executed and never modified or amended the agreement between them in writing. Thus, as
20 in *Watkins* and *Pocatello Hospital*, there was no modification that complied with the Sagecrest
21 POA-First Rate Agreement's express amendment terms.

22 **6. There is no evidence that Sagecrest POA assumed a duty to replace or repair**
23 **the water heaters in Apartment 4624, to install carbon monoxide detectors or**
24 **to warn the tenants about carbon monoxide issues.**

25 Forbush/Halowell, Switzer and First Rate argue that Sagecrest POA assumed a duty
26 through its actions. While the Court initially ruled this was a question of fact for the jury, the
27 Court erred. Sagecrest POA had no control over the interior of Apartment 4624 and thus had no
28 duty to Forbush/Halowell.

29 In this case, no party alleges, and the undisputed facts fail to support, the existence of a
30 special relationship between Sagecrest POA and Forbush/Halowell. *Beers*, 155 Idaho at 686, 316
31 P.3d at 98; *See also Rees v. State, Dep't of Health & Welfare*, 143 Idaho 10, 15 (2006) (“An
32 affirmative duty to aid or protect arises only when a special relationship exists between the
33 parties.”). Instead, Forbush/Halowell, First Rate and Switzer contend Sagecrest POA voluntarily
34 assumed a duty to perform a safety related act – to install carbon monoxide detectors and repair or

1 replace the water heaters. It is true, a party's actions can create a duty as the Supreme Court
2 recognizes.

3 A duty arises in the negligence context when one previously has undertaken to
4 perform a primarily safety-related service; others are relying on the continued
5 performance of the service; and it is reasonably foreseeable that legally-recognized
harm could result from failure to perform the undertaking.

6 *Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 316
7 P.3d 92, 100 (2013) (quoting *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 351, 179 P.3d
8 309, 314 (2008)). However, no one presented any evidence that Sagecrest POA undertook the
9 duty to warn tenants about carbon monoxide issues, or repair or replace the water heaters.
10 Moreover, there is no evidence that Kipper (the tenant in Apartment 4624) or anyone else relied
11 on Sagecrest POA to install carbon monoxide detectors or to repair or replace the water heaters.

12 In order to preclude summary judgment to the Sagecrest POA, Forbush/Halowell, Switzer
13 and First Rate must present some evidence creating a dispute of material fact that Sagecrest POA
14 undertook a duty and that Kipper, or even some other party, relied on Sagecrest POA to provide
15 and install carbon monoxide detectors or new water heaters. Other than argument, no party
16 presented any evidence that Sagecrest POA represented to anyone, including First Rate, Switzer
17 or Kipper, that it, and not the owners, would provide and install carbon monoxide detectors or
18 new water heaters. In fact, the only evidence is that Kipper did not even know who or what
19 Sagecrest POA was.¹⁰ The only evidence in the record is that both Sagecrest POA and First Rate
20 always recognized that First Rate needed Switzer's consent, as the owner of the unit, to repair or
21 replace the water heaters if the cost was over \$250.

22 On October 31, 2011, Switzer attended a Sagecrest POA Annual Meeting by telephone.
23 During that annual meeting the "smell of gas and water heater replacement" was discussed with
24 all of the owners, and Switzer learned about recommendations an engineer made after inspecting
25 the units. More particularly, the minutes provide as follows:
26
27

28 ¹⁰ Forbush/Halowell argue Ms. Kipper relied on Sagecrest POA because First Rate prepared the warning placed on
29 Apartment 4624. At the hearing, they claimed the warning indicated it was from Sagecrest POA. This claim is not
30 true. First Rate printed the warning on letterhead titled "Sagecrest Apartments." Nothing on the warning suggests it is
31 from or associated with Sagecrest POA. In fact, Kipper herself testified that she did not know anything about a
32 Sagecrest POA or any of its officers. She only dealt with First Rate.

1 X. NEW BUSINESS:

2 ***

3 B. WATER HEATER AND A/C PROBLEMS=PRV'S:

4 President Jon Kalsbeek stated that the four part program has removed the
5 flooding problems. However, not all owners have had this work performed
6 and as a result, several floods occurred. Jon requested that FRPM [First
7 Rate] compile a list of all units that have had the work done to include an
8 updated price. As a reminder the proactive repairs which to date have
9 prevented any floods and the subsequent major costs associated to it are to:

- 10 1. Filters provided by POA and changed on a regular schedule
- 11 2. Install Freeze states in each unit
- 12 3. Install Pressure Regulator Valve per building
- 13 4. Replace Expansion tanks

14 C. SMELL OF GAS AND WATER HEATER REPLACEMENT

15 The POA hired a [sic] HVAC Engineer to inspect the units and make a
16 recommendation at a cost of \$1,000. The engineer's recommendation was
17 to:

- 18 1. Increase the fresh air intakes in wall for all floor plans
- 19 2. Replace the existing water heater with a different manufacturer that
20 had side vents for floor plans A and B and C units as they fail for
21 other reasons
- 22 3. Add louvers to the closet doors for C floor plans

23 President Kalsbeek requested FRPM [**First Rate**] to send a report
24 showing which units have had the above work done. The list should
25 show which units have had the work done as well as the name of the
26 new water heater and current cost to include parts and labor.

27 It was requested that the Sagecrest Resident Managers test for CO at the
28 time they are replacing the filters and notify the appropriate owner should
29 there be concerns to discuss options.

30 Upon turnovers, Resident Managers are to encourage owners to replace the
31 smoke detectors near the water heater area with a dual CO and smoke
32 detector that hooks up to the current electrical plug with a battery as back
33 up.

It was requested that FRPM send out a master list showing exactly which units
have had what work done on them. Additionally, they would like a list of pricing
and manufacturer and model number for all major appliances (refrigerators, stove,
microwaves, dishwashers, washer and dryers) as some owners state that they were
able to find them cheaper, which should not be the case. This list should include

1 the pricing for Freeze stats [sic], PRV, expansion tank, water heater replacement,
2 fresh air vent replacement, installation of louvers on closet doors, and cost of
3 CO/smoke detectors. Also, include the cost to install the A/C condenser locks to
protect from huffing?

4 Sagecrest POA Meeting, dated October 31, 2011. On November 9, 2011, First Rate employee,
5 Tara Gaertner, emailed Sagecrest Four Plex owners, including Switzer, regarding a number of
6 maintenance matters, including water heater and carbon monoxide concerns in several buildings
7 at Sagecrest. That email provided, in relevant part, as follows:

8 Attention Owners: . . .

9 ***

10 Below are the recommendations from the HVAC engineer to solving the CO
problem in the units.

11 A. Increase the fresh air intakes for all floor plans by adding louvers to
12 the closet doors for ALL floor plans. \$187.50 per unit.

13 B. Replace existing water heater with one that has side vents for ALL
14 floor plans. \$650.

15 C. Replace the smoke detectors with CO/Smoke detector combination
16 sensor. \$62.48 per unit.

17 All of these recommended repairs are to help prevent the possibility of carbon
monoxide entering the unit. These recommendations come from a report obtained
18 by your association from a HVAC engineer evaluation.

19 Again, this work is highly recommended. **Please let me know what you would
like to have done and I can get that scheduled as soon as possible.**

20 (Emphasis added.) Contrary to First Rate's present argument, First Rate always recognized it
21 needed Switzer's consent. In fact, Switzer replied by email that same day, in relevant part, as
22 follows:

23 11-9-11

24 Hi Tara,

25 I did not know we had a CO problem in the units. Would you let me know if
26 my water heaters have a pressure release valve? The older models don't, but newer
27 ones usually come with it. I'm not worried about a water heater with side vents due
to cost.

28 I appreciate the heads up on these preventative maintenance measures. I'm trying
29 to weigh costs vs benefits. Any help you can offer is appreciated. What is the
30 general consensus among the other owners?

1 Gaertner replied to Switzer's email stating "(a)ll of your water heaters checked in good during the
2 carbon monoxide detecting. We will be doing that again in November. I will let you know if there
3 are any problems."

4 Those opposing summary judgment contend Sagecrest POA assumed the duty because
5 Sagecrest POA hired an engineering firm and helped First Rate staff to develop carbon monoxide
6 testing procedures. However, hiring an engineering firm to investigate the problem in order to
7 provide information to the individual owners is not evidence it was assuming a duty to repair or
8 replace the water heaters or to install carbon monoxide detectors. Hiring an engineer to advise the
9 owners does not expand Sagecrest POA clearly defined authorities and responsibilities. Moreover,
10 helping First Rate staff to develop proper procedures after First Rate employee Gaertner failed to
11 accurately test for carbon monoxide in several units¹¹ does not create a duty to repair or replace
12 the water heaters or to install carbon monoxide detectors inside the units.

13 As the *Beers* court held, an assumed duty is limited to the duty actually assumed – it does
14 not create a duty beyond that act actually undertaken. It is limited in scope. As observed by
15 Sagecrest POA, "the act of gathering and providing information to decision-makers is not
16 assumption of a duty with regards to repairs; those acts are wholly distinct." Defendant Sagecrest
17 Multi Family Property Owners' Association, Inc.'s Memorandum In Support Of Reconsideration
18 Of POA'S Motion For Summary Judgment, p. 12.

19 "When a party assumes a duty by voluntarily performing an act that the party had
20 no duty to perform, the duty that arises is limited to the duty actually assumed."
21 *Martin v. Twin Falls School Dist. No. 411*, 138 Idaho 146, 150, 59 P.3d 317, 321
22 (2002). Thus, merely because a party acts once does not mean that party is forever
23 duty-bound to act in a similar fashion. A beach-goer may assume a duty to rescue a
24 drowning swimmer in a non-negligent manner by undertaking to do so, but that
25 same beach-goer has no obligation to rescue anyone else. In *Martin*, the school
26 district was not required to post crossing guards at every school crossing even
27 though it had provided crossing guards at certain crossings. Thus, although a party
28 may assume a duty by undertaking to act, that duty is limited to the scope of the
29 undertaking.

30 ¹¹ After her initial alarming test results Intermountain Gas retested those same apartments and determined that she had
31 failed to properly prepare the testing unit and failed to properly test the air.

1 *Beers*, 155 Idaho at 688, 316 P.3d at 100. Thus, even if Sagecrest POA assumed a duty, once
2 completed, that duty extends no further.

3 In addition, Forbush/Halowell must show someone actually relied on the continued
4 performance of the alleged service. *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673
5 (1999) (“The underlying policy [of an assumed duty] arises from a person voluntarily assuming a
6 position, and by filling that position another can reasonably rely on that person to act with
7 reasonable care and provide protection from unreasonable risks of harm”); *Gagnon v. W. Bldg.*
8 *Maint., Inc.*, 155 Idaho 112, 115, 306 P.3d 197, 200 (2013) (A duty can arise from undertaking a
9 duty which induces reliance); *Beers*, 155 Idaho at 688-89, 316 P.3d at 100-01 (Defendants’
10 actions did not reflect the assumption of a duty which the injured party could reasonably rely.)

11 As discussed above, Sagecrest POA had authority to hire an engineering firm to provide
12 information to owners, but it could not authorize repairs or replacement of water heaters inside
13 the Four Plex units. CC&Rs, ¶3.3. First Rate and Sagecrest POA clearly understood this. That
14 understanding never changed even after Sagecrest POA had hired the engineer and provided the
15 information to the owners, First Rate clearly sought approval from Switzer. On July 19, 2011,
16 Kalsbeek, the president of Sagecrest POA, notified other Sagecrest POA officers that:

17 A situation occurred today with a building unit of having a gas smell, this caused
18 the gas company to investigate the situation and found that the original water
19 heaters are considered hazardous by the gas company, this has prompted the need
20 to replace them. FRPM [First Rate] is in the process of working with owners to get
21 these units replaced. More information should be coming from FRPM. The water
heaters are out of warranty.

22 The officers discussed finding out if there had been a recall in a series of emails. In particular, the
23 officers discussed Intermountain Gas’s and Express Plumbing’s concerns that some of the water
24 heaters had been modified and that tenants had smelled gas. However, they all recognized this
25 was an issue that needed owner decisions.

26 [T]he gas company discussed this [the modifications] with express and does not
27 like that the water heater is being modified. The problem is gas smell and fumes
28 from either the intake being clogged or the exhaust vent clogging. Is this a defect
29 of the water heater or maintenance issue. FRPM is researching this with express
30 plumbing and the gas company. The gas smell and high CO2 readings is what the
31 concern is and why it is being explained as hazardous.

1 These water heaters are over 6 or 7 years old, I believe this is average time of
2 replacement, ours usually go out at 5 to 6 years and if you are really lucky maybe
3 close to 10 years. **FRPM is working with each owner that has this brand of**
4 **water heater –to deal with replacement. This was more of an informational**
5 **item than anything else. I am trying to get something out to all owners from**
6 **the board,**

(Emphasis added.)

7 During that same time frame, First Rate discussed possible actions. On July 20, 2011, First
8 Rate Sagecrest property manager, Tara Gartner, emailed Tony Drost, First Rate president,
9 detailing the problems they had been encountering. After observing that everyone had come to the
10 conclusion that the AO Smith water heaters needed replacement, she wrote:

11 I talked to Jon [Sagecrest POA president Kalsbeek] about this last night, he said
12 **since this is an owner expense that I'll have to send something to the owners**
13 **and have them decide what they want to do.** If they want to replace all together
14 at the same time or do them once a month for example. Talking with Express
15 [plumbing] and Intermountain Gas they both said they firmly do not think this
16 should even be **an option to the owner**, that all AOSmith [sic] water heaters need
17 replaced regardless and they need replaced as soon as possible. If the owners
18 decide they do not wait to then they will have to sign a waiver basically stating that
19 if a tenant dies FRPM, Express & Intermountain Gas is not held liable for it.

20 Intermountain Gas wants to know what is being done NOW to prevent this from
21 happening tomorrow. I am delivering notices to all doors today. Express is going
22 out and buying a Carbon Monoxide tester today and will be out tomorrow testing
23 everyone's water heater to make sure there are no high readings.

24 My question is: Can we make the replacing of the water heaters mandatory or does
25 it have to be an option to the owners.

26 (Emphasis added.) There is no evidence she or anyone else from First Rate asked Sagecrest POA
27 for authority; they went to the owner.

28 On July 29, 2011, Sheila Thomason, First Rate's maintenance supervisor, sent some
29 owners, including Kalsbeek (who was an owner as well), whose water heaters had high carbon
30 monoxide readings an email regarding the water heater and carbon monoxide problems. After
31 explaining what had been happening and the fact First Rate had begun replacing some of the
32 water heaters, she wrote:

33 We are working on long term solutions so the same problem doesn't happen in
34 another 5 years. You will be notified once we have a solid plan. **Either way they**
35 **do need to be replaced for the safety of the tenants.** The initial design and

1 location of the water heaters was a poor choice on the builders [sic] end. We are
2 not replacing the water heaters with the same set up but we are looking at altering
3 the environment around them (per code) to guarantee longevity of the new water
4 heaters and safety of the tenants. I fully understand that this is a large expense.
5 Some of you have multiple water heaters that need to be replaced. Unfortunately
6 there isn't [sic] any other options. **As owners you are required to provide a safe**
7 **living environment.** Since there are a large amount of water heaters that need to
8 be replaced we are able to get a discount install of \$650 each. They have already
9 purchased 20 water heaters to lock in this rate. . . . We have attempted to collect
10 from the builders [sic] insurance company for multiple issues at the complex but
11 have been unsuccessful.

12 We will be contacting all of the tenants in danger letting them know we have
13 requested the water heater be replaced. . . .

14 **I will need a written response from each of you for documentation purposes. I**
15 **will also follow up with a phone call to ensure you have received and read this**
16 **email. Please let me know which building you own and if I have approval to**
17 **replace your water heater(s) listed.** If you prefer to use a different vendor I would
18 like that information with an approximate date to inform the tenant. . . .

19 (Emphasis added.) First Rate recognized that only the owner could approve installation of a new
20 water heater. First Rate never asked Sagecrest POA for permission, only the owners. (It does not
21 appear that at that time Switzer's Four Plex apartments had been flagged as having dangerous
22 carbon monoxide levels.)

23 In response, on August 3, 2011, Kalsbeek, an owner of an apartment that had tested high
24 and Sagecrest POA president, wrote First Rate Drost:

25 Just to clarify, **the water heaters are interior items of each unit** and is **therefore**
26 **an owners [sic] choice on how to handle this situation,** *not* the POA. This makes
27 the costs for inspections and evaluations an owner may request, owner
28 responsibility.

29 This was discussed in depth with FRPM and Sheila.

30 (Emphasis added.) Drost, First Rate's president, agreed:

31 **Everyone understands that.** As you have requested, FRPM is keeping the POA
32 **informed** of any major issues happening within the complex. Also, their [sic]
33 certainly will be savings for all if a common action/repair is made. IF [sic] we buy
100 water heaters at one time, we should be able to get them at a reduced price. If
we do them one at a time, cost [sic] will be more. We're just trying to
communicate as best we can.

1 Forbush/Halowell, First Rate and Switzer produced no evidence that at any point First Rate
2 understood that Sagecrest POA had authority to consent to repairing or replacing the water
3 heaters. Likewise, they introduced no evidence that Sagecrest POA assumed a duty to install
4 carbon monoxide detectors in the interior of the apartments. Sagecrest POA never even entered
5 any of those apartments. They presented no evidence Kipper relied on Sagecrest POA.

6 Finally, as Sagecrest POA argues, First Rate did not conduct carbon monoxide testing in
7 all of the Four Plex buildings. In fact, First Rate was not the property manager for all of the owner
8 Four Plexes. If First Rate was acting on behalf of the Sagecrest POA they would have conducted
9 testing in all of the Four Plexes. Therefore, as Sagecrest POA argues, First Rate was only acting
10 on behalf of the owners in the testing. Further, the evidence demonstrated, First Rate only
11 employed maintenance and preventative services for the buildings it managed and only
12 communicated with those owners.

13 Sagecrest POA did not assume any duty to repair or replace the water heater, warn, or
14 install carbon monoxide detectors.

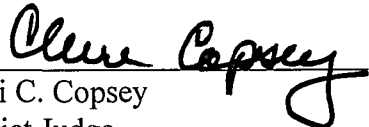
15 CONCLUSION

16 The Court grants Forbush/Halowell's motion to reconsider its Switzer decision, in part,
17 and denies Switzer partial summary judgment on the duty to warn. Whether the warning First
18 Rate issued on Switzer's behalf in 2012 was sufficient to warn Kipper of the carbon monoxide
19 danger posed by the water heater is a question for a jury. The rest of the Court's Switzer decision
20 is not reconsidered.

21 The Court likewise reconsiders its Sagecrest POA decision and grants Sagecrest POA
22 summary judgment.

23 **IT IS SO ORDERED.**

24 Dated this 26th day of May 2015.

25 
26 Cheri C. Copsey
27 District Judge
28
29
30
31

CERTIFICATE OF MAILING

I hereby certify that on this 27th day of May 2015, I mailed (served) a true and correct copy of the within instrument to:

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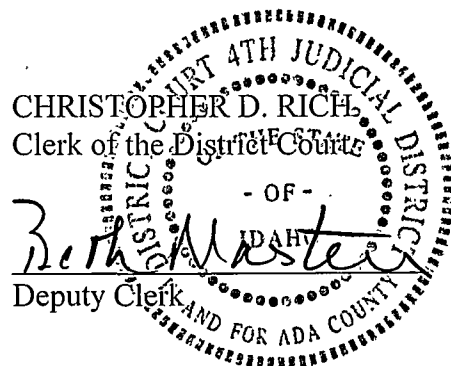
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FEB 04 2016

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHRISTOPHER D. RICH, Clerk
DEPUTY

<p>TRAVIS FORBUSH and GRETCHEN HYMAS, individually and as the natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased), and BREANNA HALOWELL,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION <i>et al.</i>,</p> <p>Defendants.</p>	<p>Case No. CV PI 1304325</p> <p>FINAL JUDGMENT</p>
--	--

JUDGMENT IS ENTERED AS FOLLOWS:

IT IS HEREBY ORDERED that all Plaintiffs' causes of action asserted against all parties in the action are dismissed with prejudice.

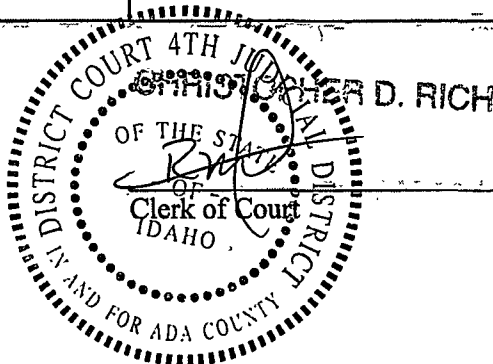
DATED this 3RD day of February, 2016.


HON. CHERI C. COPSEY

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2016, I caused a true and correct copy of the foregoing to be served via ^{email}~~US~~ Mail, postage prepaid, to the following:

William A. Fuhrman <u>BFuhrman@idalaw.com</u> Christopher Graham <u>CGraham@idalaw.com</u> JONES GLEDHILL FUHRMAN GOURLEY, P.A. 225 North 9th Street, Suite 820 Post Office Box 1097 Boise, Idaho 83701 Facsimile: (208) 331-1529 <i>For Anfinson Plumbing</i>	M. Michael Sasser <u>mms@sasseringlis.com</u> Clay Shockley SASSER & INGLIS, P.C. 1902 Judith Lane, Ste. 100 PO Box 5880 Boise, ID 83705 Phone: (208) 344-8474 Fax: (208) 344-8479 <i>For Daniel Bakken</i>
G. Bryan Ulmer Tyson E. Logan Michael F. Lutz THE SPENCE LAW FIRM PO Box 548 Jackson, WY 83001 <i>For the Plaintiffs</i>	Charles F. Peterson, Jr. 913 W. River St., Ste. 400 Boise, ID 82702 <i>For the Plaintiffs</i>



MAR 09 2016

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, *et. al.*,
Plaintiffs,

Case No. CV-PI-2013-04325

vs.

JUDGMENT

SAGECREST MULTI-FAMILY
PROPERTY OWNERS, *et. al.*,
Defendants.

JUDGMENT IS ENTERED AS FOLLOWS: claims against Defendants Jon Kalsbeek, Jay Arla, Christopher Schwab and David Meisner are dismissed with prejudice and plaintiffs shall pay costs to them in the amount of \$15,406.95.

Dated this 8th day of March 8, 2016.

Cheri C. Copsey
Cheri C. Copsey, District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of March 2016, I mailed (served) a true and correct copy of the within instruments to:

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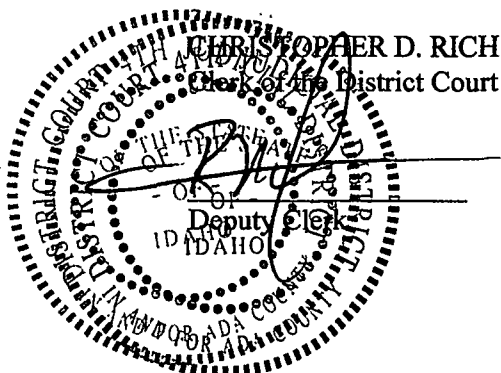
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NO. _____ FILED _____
A.M. _____ P.M. 245

MAR 17 2016

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR ADA COUNTY

TRAVIS FORBUSH and **GRETCHEN
HYMAS**, individually and as the natural
parents of **PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC**
(Deceased); and **BREANNA
HALOWELL**,

Plaintiffs/Appellants,

vs.

**SAGECREST MULTI FAMILY
PROPERTY OWNERS'
ASSOCIATION, INC.**; and

JON KALSBECK, Individually and as
President of the Sagecrest Multi Family
Property Owners' Association;

Defendants/Respondents;

Case No. CV PI 1304325

NOTICE OF APPEAL

<p>and</p> <p>JAY ARLA, Individually and as Vice President of the Sagecrest Multi Family Property Owners' Association;</p> <p>CHRIS SCHWAB, Individually and as Secretary of the Sagecrest Multi Family Property Owners' Association;</p> <p>DAVID MEISNER, Individually and as Treasurer of the Sagecrest Multi Family Property Owners' Association;</p> <p>FIRST RATE PROPERTY MANAGEMENT, Inc.;</p> <p>TONY DROST, Individually and as President of First Rate Property Management, Inc.;</p> <p>SAGECREST DEVELOPMENT, LLC;</p> <p>PARK CITY PLUMBING, Inc., n/k/a, PC PLUMBING, Inc.;</p> <p>WIDGEON MECHANICAL, LLC, n/k/a/ IDAHO GEOTHERMAL, LLC;</p> <p>A.O. SMITH, Inc.;</p> <p>MATTHEW E. SWITZER, TRUST, and MATTHEW E. SWITZER, Individually and as Trustee of the Matthew E. Switzer, Trust;</p> <p>GOODMAN MANUFACTURING COMPANY, LP;</p> <p>ANFINSON PLUMBING, LLP;</p> <p>DANIEL BAKKEN, Individually and as the employee of Anfinson Plumbing, LLP;</p> <p>H&H PROPERTIES, LLC; and</p>	
--	--

INTERMOUNTAIN GAS COMPANY;	
Defendants.	

TO: THE ABOVE NAMED RESPONDENTS, SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION, INC., AND JON KALSBECK, THE PARTIES' ATTORNEYS, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, TRAVIS FORBUSH and GRETCHEN HYMAS; individually and as the natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased); and BREANNA HALOWELL, appeal against the above named respondents to the Idaho Supreme Court from the District Court's FINAL JUDGMENT entered February 4, 2016. Plaintiffs specifically appeal the District Court's underlying Order Granting Defendants Kalsbeek, Arla, Schwab and Meisner's Motion for Summary Judgment (with respect to Kalsbeek, only), entered in the above entitled action on the 13th day of April, 2015, Honorable Judge Cheri Copsey presiding; and the District Court's Order re: Motions for Reconsideration of Sagecrest POA and Switzer Summary Judgment Decision, entered in the above entitled action on the 26th day of May, 2015, Honorable Judge Cheri Copsey presiding. A copy of the FINAL JUDGMENT and the orders being appealed are attached to this notice.
2. Appellants have a right to appeal to the Idaho Supreme Court, and the FINAL JUDGMENT described in paragraph 1 above is an appealable order under and pursuant to I.A.R. 11(a)(1).
3. The following is a preliminary statement of the issues on appeal which the appellants then intend to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellants from asserting other issues on appeal.

- a) The Sagecrest Multi Family Property Owners' Association (POA) and Jon Kalsbeek owed premises liability duties to the Plaintiffs as a result of their control over the Sagecrest apartments, both generally and specifically over features that caused the Plaintiffs' carbon monoxide ("CO") poisoning; and
 - b) The Sagecrest POA and Jon Kalsbeek voluntarily assumed duties of care by responding to the CO danger in an unreasonable manner that increased the risk of harm to the Plaintiffs.
4. An order dated September 30, 2013 was entered granting permission to file under seal; however, nothing in the record has been filed under seal.
5. Appellants request the preparation of the following portions of the reporter's transcript in electronic format:
- a) October 30, 2014 Hearing on Defendant Sagecrest Property Owners' Association's Motion for Summary Judgment;
 - b) January 15, 2015 Hearing on Defendants Kalsbeek, Arla, Schwab, and Meisner's Motion for Summary Judgment;
 - c) April 16, 2015 Hearing on Reconsideration of Sagecrest Property Owners' Association's Motion for Summary Judgment.
6. Appellants request the Standard Record be compiled pursuant to I.A.R. 28(b)(1) but with the following limitations (**limitations in bold**):
- a. Register of Actions.
 - b. Any order sealing all or any portion of the record. (**omit**)
 - c. **Plaintiffs' Fourth Amended complaint.**

- d. The original and any amended answer or response **to the Fourth Amended Complaint filed by Defendant Sagecrest Multi Family Property Owners' Association, Inc., and Defendants Kalsbeek, Arla, Schwab, and Meisner.**
- e. The original and any amended counterclaim, third party claim, or cross-claim.
(none)
- f. The original and any amended answer or response to a counterclaim. **(none)**
- g. The jury verdict rendered in a jury trial. **(none)**
- h. The findings of fact and conclusions of law and any memorandum decision entered by the court **on Defendant Sagecrest Multi Family Property Owners' Association, Inc., and Defendants Kalsbeek, Arla, Schwab, and Meisner's Motions for Summary Judgment. Specifically: (i) the Court's November 14, 2014 Order Denying Summary Judgment re: POA; (ii) the Court's May 26, 2015 Order (on reconsideration) Granting Summary Judgment re: POA; and (iii) the Court's April 13, 2015 Order Granting Summary Judgment to Kalsbeek, et al.**
- i. **The Court's final judgment entered February 4, 2016.**
- j. A list of all exhibits offered, whether or not admitted. **(none)**
- k. Notice of appeal and cross-appeal.
- l. Any request for additional reporter's transcript or clerk's record.
- m. A court reporter's notice of lodging with the district court.
- n. Table of contents and index, which shall be placed at the beginning of each volume of the record.

7. Appellants request the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R. (as detailed above, ¶ 6):
- a) July 24, 2014 Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment and all exhibits;
 - b) July 25, 2014 Affidavit of FRPM President Tony Drost in Support of Tony Drost's Motion for Summary Judgment and all exhibits;
 - c) August 7, 2014 Declaration of Eric R. Clark in Opposition to Defendant Switzer's Motion for Summary Judgment and exhibits 2, 11, and 13;
 - d) August 22, 2014 Plaintiffs' Response in Opposition to Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment;
 - e) August 22, 2014 Declaration of Eric R. Clark in in Opposition to Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment and all exhibits;
 - f) August 22, 2014 Affidavit of Robert A Mills in Opposition to Sagecrest POA's Motion for Summary Judgment and all exhibits;
 - g) September 9, 2014 Supplemental Affidavit of Counsel Craig D. Stacey in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment and Exhibit 9;
 - h) November 14, 2014 Order Denying Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Motion for Summary Judgment;
 - i) November 20, 2014 Plaintiffs' Response in Opposition to Defendants Kalsbeek, Arla, Schwab, and Meisner's Motion for Summary Judgment;

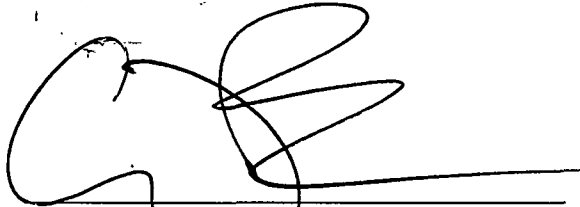
- j) November 20, 2014 Declaration of Tyson E. Logan in Opposition to Defendant Kalsbeek, Arla, Schwab, and Meisner's Motion for Summary Judgment and all exhibits;
- k) January 15, 2015 Notice of Intent to Reconsider Court's Decision Denying Sagecrest's Summary Judgment;
- l) March 2, 2015 Plaintiffs' Supplemental Brief Re: Defendant Sagecrest POA's Motion for Summary Judgment;
- m) March 2, 2015 Declaration of Michael F. Lutz to Accompany Plaintiffs' Supplemental Brief Re: Defendant Sagecrest POA's Motion for Summary Judgment and all exhibits;
- n) March 2, 2015 Affidavit of Michael L. Haman with all exhibits;
- o) March 9, 2015 Plaintiffs' Response to POA's Supplemental Brief Re: Motion for Summary Judgment;
- p) April 13, 2015 Order Granting Defendants Kalsbeek, Arla, Schwab and Meisner's Motion for Summary Judgment;
- q) May 26, 2015 Order Re: Motions for Reconsideration of Sagecrest POS and Switzer Summary Judgment Decisions.

8. I certify:

- a) That a copy of this notice of appeal has been served on the reporter of whom a transcript has been requested at the address set out in the certificate of service;
- b) That the clerk of the district court or administrative agency has been paid the estimated fee of \$200.00 for preparation of the reporter's transcript, subject to adjustment on receipt from the clerk's office of an estimate of cost;

- c) That the estimated fee of \$100.00 for preparation of the clerk's record has been paid, subject to adjustment on receipt from the clerk's office of an estimate of cost;
- d) That the appellate filing fee of \$94.00 has been paid, along with all fees required by the District Court;
- e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED THIS 17th day of March 2016.

A handwritten signature in black ink, appearing to be 'CF Peterson', written over a horizontal line.

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Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2016, I caused a true and correct copy of the foregoing NOTICE OF APPEAL to be served on the following:

Kim Madsen Ada County Courthouse Chambers Room 5149 200 W. Front Street Boise, ID 83702 <i>Court Reporter</i>	<input checked="" type="checkbox"/> US First Class Mail <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery
Michael Sasser Clay Shockley SASSER & INGLIS, P.C. 1902 W. Judith Lane, Suite 100 PO Box 5880 Boise, ID 83705 mms@sasseringlis.com cms@sasseringlis.com P: 208-344-8474 F: 208-344-8479 <i>For Daniel Bakken</i>	<input checked="" type="checkbox"/> US First Class Mail <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery
William A. Fuhrman Christopher Graham JONES GLEDHILL FUHRMAN GOURLEY, P.A. 225 North 9th Street, Suite 820 Post Office Box 1097 Boise, Idaho 83701 CGraham@idalaw.com BFuhrman@idalaw.com T: 208-331-1170 F: 208-331-1529 <i>For Anfinson Plumbing & H&H Properties, LLC</i>	<input checked="" type="checkbox"/> US First Class Mail <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery

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<p>John M. Howell BARNUM HOWELL, PLLC 380 S. 4th Street, Suite 101 PO Box 2616 Boise, ID 83701-2616 john@barnumhowell.com T: 208-336-3600 F: 208-342-3077</p> <p><i>For Kalsbeek, Arla, Schwab, & Meisner</i></p>	<p><input checked="" type="checkbox"/> US First Class Mail <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery</p>
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<p>J. Nick Crawford BRASSEY, CRAWFORD & HOWELL, PLLC 203 W. Main Street PO Box 1009 Boise, ID 83701-1009 jnc@brassey.net T: 208-344-7300 F: 208-344-7077</p> <p><i>For Park City Plumbing, Inc., n/k/a PC Plumbing, Inc.</i></p>	<p><input checked="" type="checkbox"/> US First Class Mail <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery</p>
<p>David W. Knotts Tracey L. Wright CAREY PERKINS LLP Capitol Park Plaza 300 North 6th Street, Suite 200 PO Box 519 Boise, ID 83701 T: 208-345-8600 F: 208-345-8660</p> <p><i>For Widgeon Mechanical, LLC, n/k/a Idaho Geothermal, LLC</i></p>	<p><input checked="" type="checkbox"/> US First Class Mail <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Hand Delivery</p>
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NO. 1304325 FILED
A.M. 8:57 P.M.

APR 13 2015

CHRISTOPHER D. RICH, C.
By BETH MASTERS
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, et al,

Plaintiffs,

vs.

SAGECREST MULTI-FAMILY PROPERTY
OWNERS' ASSOCIATION, et al,

Defendants.

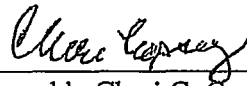
Case No. CV-PI-1304325

**ORDER GRANTING DEFENDANTS
KALSBECK, ARLA, SCHWAB AND
MEISNER'S MOTION FOR
SUMMARY JUDGMENT**

Before the Court is the Motion for Summary Judgment filed by Defendants Jon Kalsbeek, Jay Arla, Chris Schwab and David Meisner. The Court has received and reviewed the of papers and pleadings in support of and in opposition to the Motion, heard oral argument on January 15, 2015, and is fully advised in the premises.

NOW, THEREFORE, based upon the aforesaid record and the rationale and authorities articulated on the record by the Court at said hearing, IT IS HEREBY ORDERED that the Motion for Summary Judgment filed by Defendant Jon Kalsbeek, Jay Arla, Chris Schwab and David Meisner is **GRANTED**.

DATED this 13th day of April 2015.


The Honorable Cheri C. Copsey
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April 2015, I caused a true and correct copy of the foregoing **ORDER GRANTING DEFENDANTS KALSBECK, ARLA, SCHWAB AND MEISNER'S MOTION FOR SUMMARY JUDGMENT** to be served by the method indicated below, and addressed to the following:

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CHRISTOPHER D. RICH

Christopher D. Rich
Deputy Clerk

NO.
AM.

MAY 26 2015

CHRISTOPHER D. RICH, Clerk
By BETH MASTER'S
DEPUTY

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH, *et. al.*,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS' ASSOCIATION,
INC., *et. al.*,

Defendants.

Case No. CV-PI-2013-04325

ORDER RE: MOTIONS FOR
RECONSIDERATION OF
SAGECREST POA AND SWITZER
SUMMARY JUDGMENT DECISIONS

The Court orally denied summary judgment to Sagecrest Multi Family Property Owners' Association ("Sagecrest POA") on December 11, 2014. However, subsequently, on January 15, 2015, the Court informed the parties that it intended to reconsider Sagecrest POA's motion for summary judgment and invited additional briefing. During that hearing the court stated:

Having re-read the record, in particular the deposition material and all the e-mails, the Court questions whether Sagecrest POA had a duty of care, recognized by law, to Adra Kipper or her licensees to repair the water heater in her unit or to warn her of problems with her water heater.

Sagecrest POA moved for reconsideration. Plaintiffs Forbush/Halowell, Defendant First Rate Property Management ("First Rate"), and Defendant Switzer opposed reconsideration.

The Court also denied in part and granted in part Switzer's Motion for Summary Judgment in a written decision issued on September 24, 2014. In that decision, the Court found that Switzer had no duty to warn the Forbush/Halowell, as licensees, about carbon monoxide problems. During a hearing on First Rate's summary judgment, the Court suggested that its prior ruling on this issue may be incorrect. Forbush/Halowell moved the Court to reconsider its ruling on the duty to warn issue. Switzer and First Rate opposed.

1 The Court heard argument on reconsideration on April 16, 2015, and took the matter
2 under advisement effective on April 27, 2015, because the Court was in a three week trial running
3 9 a.m. to 5 p.m. every day.

4 Based on the following, the Court reconsiders its Sagecrest POA decision and grants
5 Sagecrest POA summary judgment.

6 The Court likewise grants Forbush/Halowell's motion to reconsider its Switzer decision,
7 in part, and denies Switzer partial summary judgment on the duty to warn. Whether the warning
8 First Rate issued on Switzer's behalf in 2012 was sufficient to warn Kipper of the carbon
9 monoxide danger posed by the water heater is a question for a jury.

10 RELEVANT FACTUAL BACKGROUND

11 The Sagecrest Apartment Complex consists of 48 separate buildings, each unit having four
12 individual apartments. Each separate building is owned by an individual or entities who are
13 shareholders in Defendant Sagecrest Multi Family Property Owners' Association, a not-for-profit
14 corporation.

15 In 2004, Sagecrest Development, LLC recorded the Declaration of Covenants, Conditions
16 and Restrictions ("CC&Rs") applicable to the Sagecrest Apartment subdivision, its owners, and
17 the Sagecrest POA. Sagecrest POA incorporated as a non-profit corporation and its Articles of
18 Incorporation describe its purposes and powers, in relevant part, as follows:

19 [I]t [Sagecrest POA] is formed to provide for maintenance, preservation and
20 architectural control of those certain lots as established in the Declaration of
21 Covenants, Conditions, and Restrictions of Sagecrest Subdivision . . . and to
22 promote the health, safety, and welfare of the residents within the subdivision
established by the Declarations . . .

23 ***

24 (a) exercise all of the powers and privileges and to perform all of the duties
and obligations of the Association as set forth in the Declarations . . .

25 Sagecrest POA Articles of Incorporation, (emphasis added). Sagecrest Development LLC's
26 CC&Rs prescribe Sagecrest POA's powers and responsibilities and allocate the powers and duties
27 between the owners of the individual four apartment buildings and Sagecrest POA. According to
28 the CC&Rs all individual building owners are members of Sagecrest POA.

1 ARTICLE VI.

2 SAGECREST MULTI FAMILY SUBDIVISION PROPERTY OWNERS'
3 ASSOCIATION

4 ***

5 6.2: Each person or entity who is a record Owner of a fee or undivided fee interest
6 in any Residential Lot shall be a Member of the Association. . . .

7 In addition, the CC&Rs specifically allocate responsibility for maintaining and controlling the
8 apartments between the individual building owners and the Sagecrest POA. The CC&Rs clearly
9 indicate that the individual owners control and are responsible for maintaining and repairing the
10 interior areas of the apartments, including the water heaters. Sagecrest POA only controls the
11 exterior areas and is responsible for exterior maintenance and repair. The CC&Rs provide, in
12 relevant part, as follows:

13 ARTICLE VI.

14 NATURE OF OWNERSHIP/MAINTENANCE

15 ***

16 3.3 Maintenance of Lots and Four Plexes¹.

17 A. The Association shall maintain the following:

- 18 1. The following portions of the exterior of each Four Plex: ...
19 including the entry way, exterior stairs, railings and decks, and
20 roofs.
- 21 2. All Sidewalks on the Property.
- 22 3. All landscaping on the Property, including, without limitation, all
23 grass areas, shrubs, trees and bushes that are on Residential Lots
24 and the Recreational Center Lot, and all planters, whether they are
25 on Residential Lots or in the Common Areas.
- 26 4. Drainage Facilities, including the Drainage Lot.
- 27 5. The Common Areas.
- 28 6. Any perimeter fence.
- 29 7. The main lines, service lines, valves, and sprinkler heads of the
30 PUIS [pressurized irrigation system] on the Property to the extent
31 that they are not maintained by the Nampa Irrigation District.

32
33 ¹ Four Plex is defined as "a residential building on each Residential Lot of the Property that is comprised of four
separate single family residential units." See CC&Rs, Article II, Definitions. Residential Lots are defined as "all Lots
on the Multi Family Portion of the Plat, except the Recreational Center Lot, the Driving and Parking Lot, and the
Drainage Lot." *Id.*

1 B. The Owner shall maintain the following:

- 2 1. The following portions of the exterior of the each Four Plex:
3 windows, doors, exterior air conditioning units and all other
4 exterior maintenance not performed by the Association; and
5 2. The entire interior of the Four Plexes, including but not limited
6 to flooring, ceilings, walls and wall coverings, appliances,
7 plumbing and plumbing fixtures, electrical system and fixtures,
8 all interior components of the heating and air conditioning
9 system.

10 ***

11 3.5 Owner's Right with Respect to Interiors: Each Owner shall have the
12 exclusive right to ..., repair, ... or otherwise maintain, ... the interior portions of
13 their Four Plex, ...

14 3.6 Easements for Access for Repair, Maintenance: The Association is hereby
15 granted an irrevocable easement for purposes of access to and upon each
16 Residential Lot and Four Plex, during reasonable hours and as necessary for the
17 maintenance and repair of the Residential Lot and Four Plex thereon.

18 ***

19 3.8 Failure of Owner to Maintain such Owner's Residential Lot or Four Plex:
20 In the event the Owner of any Residential Lot improved with a Four Plex shall fail
21 to maintain any portion of such Owner's Residential Lot that Owner is
22 responsible to maintain, in a manner reasonable [sic] satisfactory to the Board,
23 after approval by vote of at least sixty percent (60%) of the members of the Board
24 present and voting and subject to such Owner's right to notice and a hearing before
25 the Board, the Association may, through its agents and employees, enter upon the
26 Residential Lot or Four Plex and repair, maintain and restore the Residential Lot,
27 or the Four Plex.

28 ***

29 ARTICLE IX.

30 RESERVED EASEMENTS

31 ***

32 9.3 Maintenance Easement: An easement is hereby reserved to Declarant
[Sagecrest Development LLC or its successor] and any member of the Board of
Directors [of the Sagecrest POA] or Manager, and their respective officers, agents,
employees and assigns, upon, across, over, in and under the Property and a right to
make such use of the Property as may be necessary or appropriate to make
emergency repairs or to perform the duties and functions which the Association is
obligated or permitted to perform, including but not limited to the following: the
right to enter upon any Residential Lot and the exterior of any Four Plex for the
purpose of performing repairs and maintenance to such Residential Lot or Four
Plex, as provided herein; and the right to enter upon any Residential Lot to perform

1 landscaping services, and to install, repair and maintain the PUIS [pressurized
2 irrigation system].

3 CC&Rs (emphasis added).

4 Important to the Court's analysis are the definitions found in the CC&Rs. "Four Plex" is
5 defined as "a residential building on each Residential Lot of the Property that is comprised of four
6 separate single family residential units." See CC&Rs, Article II, Definitions. "Residential Lots" is
7 defined as "all Lots on the Multi Family Portion of the Plat, except the Recreational Center Lot,
8 the Driving and Parking Lot, and the Drainage Lot." *Id.* "Property" is defined as "the real property
9 described in Exhibit A." *Id.*

10 Defendant Switzer owns building number 46 and the four apartments within that building,
11 including Apartment 4624. Switzer has owned these apartments since February 2008.

12 From 2006 to early 2010, Defendant H&H Properties acted as the property manager at
13 Sagecrest. During the time H&H Properties managed the Sagecrest Apartment Complex, H&H
14 Properties had an oral agreement with Defendant Anfinson Plumbing to perform plumbing work
15 as needed. In April 2009, the tenant in Apartment 4624 contacted H&H Properties complaining
16 there was no hot water. H&H Properties contacted Anfinson Plumbing.

17 Anfinson Plumbing replaced the burner assembly in the gas-fired water heater in
18 Apartment 4624 but failed to install a thermocouple with the integrated thermal cut off switch
19 ("TCO"). An integrated thermal cut off switch is a safety device that Forbush/Halowell alleges
20 would have prevented the carbon monoxide leak and their injuries in 2012. Instead, the plumber
21 allegedly replaced the burner assembly with a standard thermocouple without an integrated TCO.

22 On March 15, 2010, Sagecrest POA contracted with First Rate Property Management
23 ("First Rate"), to act as a property manager and entered into an agreement ("First Rate-Sagecrest
24 POA Agreement"). The First Rate-Sagecrest POA Agreement provides, in relevant part, as
25 follows:

26 3.0 DUTIES OF AGENT

27 3.1 Receive maintenance requests and complaints relating to the
28 property, and in a timely and efficient manner inform the
29 appropriate contractors (which shall be selected by
30 ASSOCIATION) or ASSOCIATION employees or Board of
31 Directors of the necessity of corrective action.

3.3 Promptly notify the ASSOCIATION in the event any matter comes to the attention of AGENT relating to the condition of the Property or any violation of ASSOCIATION rules and regulations, which requires the attention of the ASSOCIATION.

3.4 Take such action as AGENT deems reasonable and appropriate in the event of any emergency brought to AGENT's attention which may result in damage to the Property or cause injury to tenants and occupants of the Property. Notwithstanding this authority, it is understood and agreed that AGENT will if at all possible, confer immediately with the President or other authorized officer of the ASSOCIATION regarding all emergency repairs in excess of \$300.00 without first obtaining approval of the ASSOCIATION.

7.0 AUTHORITY OF PARTIES

7.1 ASSOCIATION hereby grants to AGENT the authority and power to perform such acts and deeds, and to incur such costs and expenses, all on behalf of and as agent for the ASSOCIATION, as shall be reasonable and necessarily required to carry out AGENT's duties and responsibilities hereunder.

First Rate-Sagecrest POA Agreement, (emphasis added).

In addition to entering into an agreement with Sagecrest POA to manage and maintain the complex's exterior and grounds, First Rate contracted separately with each individual Four Plex owner to manage and maintain the respective apartments' interiors. First Rate was NOT the property manager for all the Four Plex owners -- only those who contracted with it for its services. First Rate entered into a total of 44 separate property management agreements with owners.

Switzer and First Rate entered into a property management agreement ("Switzer-First Rate Agreement") for First Rate to manage Switzer's Building 46 and the four apartments within that building, including Apartment 4624. The Switzer-First Rate Agreement provided, in relevant part, as follows:

2. APPOINTMENT OF AGENT

2.1 OWNER hereby appoints AGENT as sole and exclusive agent of OWNER to manage the PREMISES described in paragraph 2.2 upon the terms and conditions provided herein. AGENT accepts the appointment and agrees to furnish the services of its organization for the management of the PREMISES.

2.2 The property to be managed by AGENT under this AGREEMENT (the "PREMISES") is located at 1805 E. Overland Bldg. 46 #11. #12. #23 and #24 the city of Meridian in the state of Idaho.

2.5 OWNER authorizes AGENT to contract for services to include but not limited to, water, sewer, garbage, gas, electric, irrigation, yard care, maintenance agreements, and coin operated washer and dryers. OWNER to assume the obligation of any contracts entered.

9. MAINTENANCE AND REPAIRS

9.1 AGENT is authorized to make or cause to be made, through contracted services or otherwise, all ordinary repairs and replacements reasonably necessary to preserve and maintain the PREMISES in an attractive condition and in good state of repair for the operating efficiency of the PREMISES, and all alterations required to comply with lease requirements AGENT is also authorized to purchase or rent, on OWNER's behalf, all equipment, tools, appliances, materials, supplies, and other items necessary for the management, maintenance, or operation of the PREMISES AGENT shall not be liable to OWNER for any act, omission, or breach of duty of such independent contractors or suppliers.

9.4 Agent shall contract for bi-annual Preventative Maintenance at the expense of the Owner. The contractor will check all plumbing and plumbing fixtures, caulking, door stops, dryer vents, smoke detectors, and furnace filters and make necessary repairs

9.5 The expense incurred for any one transaction shall not exceed \$250.00, except monthly or recurring operating charges and emergency repairs, unless otherwise authorized by the OWNER, typically done by e-mail.

19. SPECIAL POWER OF ATTORNEY

KNOWN ALL MEN BY THESE PRESENTS; that the OWNER has made, constituted, and appointed and by these presents do make, constitute and appoint First Rate Property Management, Inc. and its agents, true and lawful attorney for and in their name, place and stated, and for their use and benefit as follows: (Idaho Code, Section 15-12-105)

19.2 ...to order, direct, superintend, and manage all repairs, alterations, and improvements...in general, to do and perform all acts and things incident to management of the PREMISES...

1 Switzer-First Rate Agreement, (emphasis added).

2 On April 8, 2011, Adra Kipper leased Apartment 4624 in the Sagecrest Apartments, and
3 executed a one-year rental agreement with First Rate ("Kipper-First Rate Agreement"). She
4 renewed that agreement for one year on March 19, 2012. Adra Kipper was the sole occupant
5 except for when her children or her boyfriend came to stay. The Kipper-First Rate Agreement
6 provided, in relevant part, as follows:

7 **THIS AGREEMENT**, made and entered *April 8th, 2011*, between First Rate
8 Property Management, Inc., as acting Agent for Owner of the below named
9 property and herein after called "Landlord," and **ADRA KIPPER** hereafter called
"Tenant."

10 1. **AGENT:** Tenant understands that Landlord [First Rate] is the acting agent
11 of the "Owner."

12 ***

13 34. **ENTRY AND INSPECTION.** Landlord has the right to enter the Premises
14 and Tenant agrees not to unreasonably withhold from the Landlord consent to
exhibit the Premises to ... workmen, contractors

15 ***

16 39. **REPAIRS AND MALFUNCTIONS.** All service or repairs, which fall
17 within the responsibility of the Landlord, shall be requested in writing. Tenant
18 shall not make repairs or hire contractors to make repairs. Landlord shall respond
19 to the emergency maintenance request, as soon as possible. For the purposes of this
20 Rental Agreement, emergency maintenance is ... smell of gas. Tenant is directed
to call 911 for emergencies causing immediate danger such as fire Tenant
agrees to attempt to remedy the below maintenance issues prior to notifying
Landlord:

21 ***

22 5. **No hot water:** Check thermostat on tank for proper temperature
23 setting. Check that thermostat is not set to "vacation." Check and
reset breaker in power panel. Check and reset button next to
thermostat.

24 ***

25 41. **ACCESS FOR REPAIRS:** Tenant hereby agrees, requests, and authorizes
26 Landlord to allow maintenance contractors and personnel to check out a key from
27 Landlord with the sole purpose to gain access to the property to make necessary
repairs....

28 Kipper-First Rate Agreement (emphasis in the original). Kipper did not have any contact with
29 Switzer or any member of the Sagecrest POA and dealt only with First Rate. She also testified
30 that she did not even know anything about Sagecrest POA and had never even heard of any of its
31

1 officers. By virtue of this agreement, Kipper had no authority to make repairs or to hire anyone to
2 repair the water heater.

3 During summer 2011, First Rate learned that several units' water heaters were causing
4 problems. On July 19, 2011, Jon Kalsbeek, the president of Sagecrest POA, notified other
5 Sagecrest POA officers that:

6 A situation occurred today with a building unit of having a gas smell, this caused
7 the gas company to investigate the situation and found that the original water
8 heaters are considered hazardous by the gas company, this has prompted the need
9 to replace them. FRPM [First Rate] is in the process of working with owners to get
these units replaced. More information should be coming from FRPM. The water
heaters are out of warranty.

10 The officers discussed finding out if there had been a recall in a series of emails. In particular, the
11 officers discussed Intermountain Gas's and Express Plumbing's concerns that some of the water
12 heaters had been modified and that tenants had smelled gas. However, they all recognized this
13 was an issue that needed owner decisions.

14 [T]he gas company discussed this [the modifications] with express and does not
15 like that the water heater is being modified. The problem is gas smell and fumes
16 from either the intake being clogged or the exhaust vent clogging. Is this a defect
17 of the water heater or maintenance issue. FRPM is researching this with express
18 plumbing and the gas company. The gas smell and high CO2 readings is what the
concern is and why it is being explained as hazardous.

19 These water heaters are over 6 or 7 years old, I believe this is average time of
20 replacement, ours usually go out at 5 to 6 years and if you are really lucky maybe
21 close to 10 years. FRPM is working with each owner that has this brand of
22 water heater -to deal with replacement. This was more of an informational
item than anything else. I am trying to get something out to all owners from
the board,

23 (Emphasis added.)

24 During that same time frame, First Rate discussed possible actions. On July 20, 2011, First
25 Rate Sagecrest property manager, Tara Gartner, emailed Tony Drost, First Rate president,
26 detailing the problems they had been encountering. After observing that everyone had come to the
27 conclusion that the AO Smith water heaters needed replacement, she wrote:

28 I talked to Jon [Sagecrest POA president Kalsbeek] about this last night, he said
29 since this is an owner expense that I'll have to send something to the owners
30 and have them decide what they want to do. If they want to replace all together

1 at the same time or do them once a month for example. Talking with Express
2 [plumbing] and Intermountain Gas they both said they firmly do not think this
3 should even be an option to the owner; that all AOSmith [sic] water heaters need
4 replaced regardless and they need replaced as soon as possible. If the owners
5 decide they do not wait to then they will have to sign a waiver basically stating that
6 if a tenant dies FRPM, Express & Intermountain Gas is not held liable for it.

7 Intermountain Gas wants to know what is being done NOW to prevent this from
8 happening tomorrow. I am delivering notices to all doors today. Express is going
9 out and buying a Carbon Monoxide tester today and will be out tomorrow testing
10 everyone's water heater to make sure there are no high readings.

11 My question is: Can we make the replacing of the water heaters mandatory or does
12 it have to be an option to the owners.

13 (Emphasis added.) Drost responded the next day:

14 Please let me know the results of the test. I am having a hard time believing that
15 we have to replace them and there is no acceptable retro available. But, I'll trust
16 the experts.

17 On July 29, 2011, Sheila Thomason, First Rate's maintenance supervisor, sent some
18 owners, including Kalsbeek, whose water heaters had high carbon monoxide readings an email
19 regarding the water heater and carbon monoxide problems. After explaining what had been
20 happening and the fact First Rate had begun replacing some of the water heaters, she wrote:

21 We are working on long term solutions so the same problem doesn't happen in
22 another 5 years. You will be notified once we have a solid plan. **Either way they**
23 **do need to be replaced for the safety of the tenants.** The initial design and
24 location of the water heaters was a poor choice on the builders [sic] end. We are
25 not replacing the water heaters with the same set up but we are looking at altering
26 the environment around them (per code) to guarantee longevity of the new water
27 heaters and safety of the tenants. I fully understand that this is a large expense.
28 Some of you have multiple water heaters that need to be replaced. Unfortunately
29 there isn't [sic] any other options. **As owners you are required to provide a safe**
30 **living environment.** Since there are a large amount of water heaters that need to
31 be replaced we are able to get a discount install of \$650 each. They have already
32 purchased 20 water heaters to lock in this rate. . . . We have attempted to collect
from the builders [sic] insurance company for multiple issues at the complex but
have been unsuccessful.

33 We will be contacting all of the tenants in danger letting them know we have
requested the water heater be replaced. . . .

34 I will need a written response from each of you for documentation purposes. I
will also follow up with a phone call to ensure you have received and read this
email. Please let me know which building you own and *if I have approval to*

1 *replace your water heater(s) listed.* If you prefer to use a different vendor I would
2 like that information with an approximate date to inform the tenant. . . .

3 (Emphasis added.) First Rate recognized that only the owner could approve installation of a new
4 water heater. It does not appear that at that time Switzer's Four Plex apartments had been flagged
5 as having dangerous carbon monoxide levels.

6 This email was copied to the Sagecrest POA officers. In response, on August 3, 2011,
7 Kalsbeek, Sagecrest POA president, wrote First Rate Drost:

8 Just to clarify, the water heaters are interior items of each unit and is therefore
9 an owners [sic] choice on how to handle this situation, not the POA. This makes
10 the costs for inspections and evaluations an owner may request, owner
11 responsibility.

12 This was discussed in depth with FRPM and Sheila.

13 (Emphasis added.) Drost, president of First Rate, replied:

14 Everyone understands that. As you have requested, FRPM is keeping the POA
15 informed of any major issues happening within the complex. Also, their [sic]
16 certainly will be savings for all if a common action/repair is made. IF [sic] we buy
17 100 water heaters at one time, we should be able to get them at a reduced price. If
18 we do them one at a time, cost [sic] will be more. We're just trying to
19 communicate as best we can.

20 On October 31, 2011, Switzer attended a Sagecrest POA Annual Meeting by telephone.
21 During that annual meeting the "smell of gas and water heater replacement" was discussed with
22 all of the owners, and Switzer learned about recommendations an engineer made after inspecting
23 the units. More particularly, the minutes provide as follows:

24 X. NEW BUSINESS:

25 ***

26 B. WATER HEATER AND A/C PROBLEMS=PRV'S:

27 President Jon Kalsbeek stated that the four part program has removed the
28 flooding problems. However, not all owners have had this work performed
29 and as a result, several floods occurred. Jon requested that FRPM [First
30 Rate] compile a list of all units that have had the work done to include an
31 updated price. As a reminder the proactive repairs which to date have
32 prevented any floods and the subsequent major costs associated to it are to:

- 33 1. Filters provided by POA and changed on a regular schedule
- 34 2. Install Freeze states in each unit
- 35 3. Install Pressure Regulator Valve per building

1 4. Replace Expansion tanks

2 C. SMELL OF GAS AND WATER HEATER REPLACEMENT

3 The POA hired a [sic] HVAC Engineer to inspect the units and make a
4 recommendation at a cost of \$1,000. The engineer's recommendation was
5 to:

- 6 1. Increase the fresh air intakes in wall for all floor plans
7 2. Replace the existing water heater with a different manufacturer that
8 had side vents for floor plans A and B and C units as they fail for
9 other reasons
10 3. Add louvers to the closet doors for C floor plans

11 President Kalsbeek requested FRPM [First Rate] to send a report
12 showing which units have had the above work done. The list should
13 show which units have had the work done as well as the name of the
14 new water heater and current cost to include parts and labor.

15 It was requested that the Sagecrest Resident Managers test for CO at the
16 time they are replacing the filters and notify the appropriate owner should
17 there be concerns to discuss options.

18 Upon turnovers, Resident Managers are to encourage owners to replace the
19 smoke detectors near the water heater area with a dual CO and smoke
20 detector that hooks up to the current electrical plug with a battery as back
21 up.

22 It was requested that FRPM send out a master list showing exactly which units
23 have had what work done on them. Additionally, they would like a list of pricing
24 and manufacturer and model number for all major appliances (refrigerators, stove,
25 microwaves, dishwashers, washer and dryers) as some owners state that they were
26 able to find them cheaper, which should not be the case. This list should include
27 the pricing for Freeze stats [sic], PRV, expansion tank, water heater replacement,
28 fresh air vent replacement, installation of louvers on closet doors, and cost of
29 CO/smoke detectors. Also, include the cost to install the A/C condenser locks to
30 protect from huffing?

31 Sagecrest POA Meeting, dated October 31, 2011.

32 On November 9, 2011, First Rate employee, Tara Gaertner, emailed Sagecrest owners,
including Switzer, regarding a number of maintenance matters, including water heater and carbon
monoxide concerns in several buildings at Sagecrest. That email that provided, in relevant part, as
follows:

Attention Owners: . . .

1 Below are the recommendations from the HVAC engineer to solving the CO
2 problem in the units.

3 A. Increase the fresh air intakes for all floor plans by adding louvers to
4 the closet doors for ALL floor plans. \$187.50 per unit.

5 B. Replace existing water heater with one that has side vents for ALL
6 floor plans. \$650.

7 C. Replace the smoke detectors with CO/Smoke detector combination
8 sensor. \$62.48 per unit.

9 All of these recommended repairs are to help prevent the possibility of carbon
10 monoxide entering the unit. These recommendations come from a report obtained
11 by your association from a HVAC engineer evaluation.

12 Again, this work is highly recommended. Please let me know what you would
13 like to have done and I can get that scheduled as soon as possible.

14 (Emphasis added.) Switzer replied by email that same day, in relevant part, as follows:

15 11-9-11

16 Hi Tara,

17 I did not know we had a CO problem in the units. Would you let me know if
18 my water heaters have a pressure release valve? The older models don't, but newer
19 ones usually come with it. I'm not worried about a water heater with side vents due
20 to cost.

21 I appreciate the heads up on these preventative maintenance measures. I'm trying
22 to weigh costs vs benefits. Any help you can offer is appreciated. What is the
23 general consensus among the other owners?

24 Gaertner replied to Switzer's email stating "(a)ll of your water heaters checked in good during the
25 carbon monoxide detecting. We will be doing that again in November. I will let you know if there
26 are any problems."

27 Gaertner testified that she might have contacted Switzer by phone sometime on March 9,
28 2012, regarding high readings of carbon monoxide in Apartment 4624 but Switzer testified he
29 was not contacted. Switzer's phone records do not show any calls to or from a 208 area code in
30 the month of March, 2012.

31 First Rate's Gaertner began testing carbon monoxide levels in the apartments and
32 reporting those readings to both the respective owners and Sagecrest POA president Kalsbeek
33 when they were high. On March 9, 2012, Gaertner obtained high readings in some apartments and
34 First Rate replaced those water heaters.

1 On March 12, 2012, Intermountain Gas tested for carbon monoxide in apartment 4624 and
2 found 19 ppm carbon monoxide in the "flue" of the water heater but none outside in the ambient
3 air. Intermountain Gas indicated this was a normal reading. Intermountain Gas tested other
4 apartments where Gaertner had found "high" readings and determined the readings were normal.
5 First Rate halted replacing the water heaters. One of Kalsbeek's own apartments Gaertner tested
6 as high but Intermountain Gas found the levels were likewise normal. (Like other Sagecrest POA
7 board members, Kalsbeek owns a Four Plex building.)

8 Kalsbeek met with First Rate employees and developed a testing procedure for future
9 testing. The testing procedure was circulated to the other board members before adoption.
10 Sagecrest POA sent the procedures to the owners. Among other things, the procedures included
11 installing hardwired CO/fire detectors during preventative maintenance, turnovers, faulty fire
12 detector replacements, and during lease renewals.

13 In early 2012, First Rate posted a written notice on tenant doors, including Adra Kipper's
14 door, alerting them to the fact that there were higher levels of carbon monoxide escaping through
15 the vent on top of the water heater. That notice provided as follows:

16 **IMPORTANT!**

17 Upon our recent inspections of the water heaters at Sagecrest we have found that
18 your unit shows higher levels of carbon monoxide than we would like to see. The
19 carbon monoxide is exiting through the vent on the top of the water heater but does
20 have the potential of entering the unit. It is very important if you run your dryer to
21 keep the bi-fold doors open at all times. We have provided carbon monoxide
22 detectors for safety precautions until your water heater can be replaced next week.
23 Please read the instructions so it is properly placed in your apartment and you are
24 aware of how it operates. Please do not attach them to the walls since they will be
25 picked up once your water heater is replaced. The owner of your property has been
26 informed of the situation. They are scheduled for replacement starting on Monday
27 until the job is complete. Please also consider this your notice of intent to enter for
28 the replacement. We do not have a firm schedule of what units will be completed
29 when but are trying our best to do them quickly. If the carbon monoxide detector
30 goes off please open all windows and contact Intermountain Gas at 377-6840. For
31 extra safety precautions it wouldn't hurt to sleep with a couple windows open. If
32 you would like to shut your water heater off you may turn it to "vacation" but you
will not have hot water. Please call if you have any further questions or concerns.
Thank you for your understanding while we all work to get this matter resolved.

1 While at oral argument, Forbush plaintiffs argued that this warning indicated that it came from
2 Sagecrest POA, which is not true. The warning was printed on letterhead with the title "Sagecrest
3 Apartments" and nothing indicated Sagecrest POA. In addition, Kipper testified that she did not
4 know anything about a Sagecrest POA or any of its officers. She only dealt with First Rate.

5 First Rate provided the tenants with carbon monoxide detectors, but the detector in
6 Apartment 4624 did not work. As of November 10, 2012, the time of Forbush's death, the water
7 heater in Apartment 4624 had not been replaced.

8 Throughout the summer, First Rate continued to work on the problem. Sagecrest POA
9 directors asked to be kept in the loop but continued to maintain that this was an interior problem
10 needing Owner approval.

11 On October 10, 2012, another tenant's hardwired detector alerted and Intermountain
12 responded to her call and found dangerous levels of carbon monoxide. First Rate immediately
13 replaced her water heater.

14 On November 10, 2012, eighteen-year-old Private First-Class McQuen C. Forbush, who
15 was home on leave from the United States Marine Corps., and Breanna Halowell, who was also
16 eighteen at this time, stayed at the Sagecrest Apartments, Apartment 4624 as Kipper's invited
17 guests. Plaintiffs' Travis Forbush and Gretchen Hymas are Forbush's natural parents. On
18 November 10, 2012, Forbush died from carbon-monoxide poisoning. Halowell was holding
19 Forbush when he died and suffered severe injuries herself. It is undisputed that no one, including
20 Kipper, told Halowell or Forbush about possible carbon monoxide emissions, water heater
21 concerns or problems with the carbon monoxide detector related to Apartment 4624.
22 Forbush/Halowell sued Switzer, as the owner of the apartment and Sagecrest POA.

23 ANALYSIS

24 "On a motion for reconsideration, the court must consider any new admissible evidence or
25 authority bearing on the correctness of an interlocutory order. However, a motion for
26 reconsideration need not be supported by any new evidence or authority." *Fragnella v. Petrovich*,
27 153 Idaho 266, 276, 281 P.3d 103, 113 (2012) (internal citations omitted).

28 Both motions to reconsider involve summary judgment motions and, therefore, the
29 summary judgment standard applies to consideration of those motions. Summary judgment is
30

1 appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits,
2 if any, show that there is no genuine issue as to any material fact and that the moving party is
3 entitled to a judgment as a matter of law." *Beaudoin v. Davidson Trust Co.*, 151 Idaho 701, 704,
4 263 P.3d 755, 758 (2011), quoting I.R.C.P. 56(c). The burden is on the moving party to show that
5 no genuine issues of material fact exist. *Soignier v. Fletcher*, 151 Idaho 322, 324, 256 P.3d 730,
6 732 (2011), citing *Stoddart v. Pocatello Sch. Dist. No. 25*, 149 Idaho 679, 683, 239 P.3d 784, 788
7 (2010). Disputed facts are "liberally construed in favor of the nonmoving party and 'all reasonable
8 inferences that can be drawn from the record are to be drawn in favor of the nonmoving party.'"
9 *Patterson v. State of Idaho, Dep't of Health Welfare*, 151 Idaho 310, 315, 256 P.3d 718, 723
10 (2011), quoting *Mackay v. Four Rivers Packing Co.*, 145 Idaho 408, 410, 179 P.3d 1064, 1066
11 (2008). "If reasonable people might reach a different conclusion from conflicting inferences based
12 on the evidence," then the summary judgment motion must be denied. *Cramer v. Slater*, 146
13 Idaho 868, 873, 204 P.3d 508, 513 (2009), citing *Mackay*, 145 Idaho at 410, 179 P.3d at 1066.

14 Once the moving party establishes the absence of a genuine issue of fact, the burden shifts
15 to the nonmoving party to produce admissible evidence, which sets forth specific facts showing
16 the existence of a genuine issue of fact on the elements challenged by the moving party. I.R.C.P.
17 56(e); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720-21, 791 P.2d 1285, 1299-1300 (1990);
18 *Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 530-31, 887 P.2d 1034, 1037-38 (1994). An
19 opposing party may not merely rest on allegations contained in his pleadings nor may the
20 opposing party's case rest on speculation or conclusory assertions. *Northwest Bec-Corp v. Home*
21 *Living Serv.*, 136 Idaho 835, 839, 41 P.3d 263, 267 (2002); *McCoy*, 120 Idaho at 769, 820 P.2d at
22 364. The party opposing the motion must produce evidence, by affidavit or otherwise, to show
23 that there is indeed a genuine issue for trial. I.R.C.P. 56(e); *Olsen*, 117 Idaho at 720, 791 P.2d at
24 1299.

25 It is against this legal background that the Court considers these two motions for
26 reconsideration.
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1 A. Switzer had a duty to warn tenant Kipper and whether the warning actually given
2 adequately advised Kipper of the danger created by the water heater is a jury
3 question.

4 The Court previously ruled that Switzer had no duty to warn Forbush/Halowell. More
5 specifically, the Court ruled:

6 [O]nly the entity or person having control over the property (Adra Kipper) bears
7 the burden of warning social guests of dangerous conditions on the property.
8 *Robinson v. Mueller*, 156 Idaho at ___, 322 P.3d at 322. It is undisputed that both
9 Forbush and Halowell were social guests of the tenant, Adra Kipper. Therefore,
while Kipper had a duty to warn Forbush/Halowell, Switzer, as the landlord, has
no duty to warn Kipper's social guests. *Id.* Any claim based on a duty to warn fails.

10 Order Denying Switzer Summary Judgment, pgs. 9-10. However, upon further reflection, the
11 Court notified the parties it may have erred and indicated it would entertain reconsideration.

12 Forbush/Halowell support reconsideration and Switzer opposes. First Rate joins in
13 opposing reconsideration. The issue on reconsideration is narrow. The issue is whether Switzer,²
14 as the landowner and lessor, had a duty to warn Ms. Kipper, the tenant, about the water heater
15 safety problems and the carbon monoxide dangers.

16 If Switzer did not owe her a duty to warn her about the carbon monoxide dangers, then he
17 cannot be liable to Forbush/Halowell. However, if Switzer had that duty but failed to adequately
18 warn her, the issue becomes whether Switzer may be liable to Forbush/Halowell for any injuries
19 caused by that failure even though Forbush/Halowell were licensees.

20 The facts in this case are unique and Idaho Courts have never directly addressed the issue
21 of what duty a landlord owes a tenant's social guests where the landlord knows of a dangerous
22 condition, has an express contractual duty to repair that condition, but fails to warn the tenant or
23 the licensee about that danger.

24 As the parties acknowledge, any analysis begins with the *Robinson* and *Harrison* cases.
25 *See Harrison v. Taylor*, 115 Idaho 588, 595-96, 768 P.2d 1321, 1328-29 (1989); *Robinson v.*
26 *Mueller*, 156 Idaho 237, 240, 322 P.3d 319, 322 (Ct. App. 2014). It is well established that the
27 duties owed by owners, landlords and possessors of land depends on the status of the person
28 injured on the land – whether invitee, licensee, or trespasser, *Ball v. City of Blackfoot*, 152 Idaho
29

30 ² Throughout this discussion, the Court assumes that Switzer acted through its agent, First Rate.
31

1 673, 677, 273 P.3d 1266, 1270 (2012). Bréanna Halowell and Travis Forbush were undeniably
2 social guests or licensees and, thus, Switzer's duties to them are defined by their status as social
3 guests. The Court of Appeals summarized the existing Idaho law on the duty owed to social
4 guests as follows:

5 A person who enters the property of another with passive permission or as a mere
6 social guest traditionally has been held to understand that he must take the land as
7 the possessor uses it. This entrant, classified by the law as a licensee, is expected to
8 be alert and to protect himself from the risks he encounters. Accordingly, the duty
9 owed to a licensee with respect to such risks is narrowly restricted. The possessor
10 is required simply to share his knowledge of dangerous conditions or dangerous
11 activities with the licensee. When such a warning has been given, the possessor's
12 knowledge is no longer superior to that of the licensee, and the possessor's duty
extends no farther. Of course, the possessor must avoid willful and wanton injury
to the licensee. But ordinary negligence allowing an unsafe condition or activity on
the property is insufficient, by itself, to impose liability to a licensee.

13 *Robinson*, 156 Idaho at 240, 322 P.3d at 322 (quoting *Keller v. Holiday Inns, Inc.*, 105 Idaho 649,
14 652-53, 671 P.2d 1112, 1115-16 (Ct. App. 1983), *vacated on other grounds*, 107 Idaho 593, 691
15 P.2d 1208 (1984)(emphasis added). However, "[a] landowner is only required to share with the
16 licensee knowledge of dangerous conditions or activities on the land." *Id.* (citing *Evans v. Park*,
17 112 Idaho 400, 401, 732 P.2d 369, 370 (Ct. App. 1987)).

18 In *Robinson*, the landlord rented an apartment that included access onto the roof through a
19 recessed dormer and the dormer had no railings – an open and obvious danger. The landlord
20 actually warned the tenant about the lack of railings.

21 In September 2009, Robinson and the tenant met at a local bar. The two shared
22 drinks and then went to the tenant's apartment. Inside the bedroom, the tenant
23 opened the door to the dormer to let in cool air and to enjoy the view. The tenant
24 then went downstairs to retrieve an item from his car. During this time, Robinson
25 wrapped herself in a blanket and walked toward the recessed dormer. As Robinson
went through the doorway, she tripped and fell. Robinson rolled off the dormer and
onto the ground 12 feet below. As a result of the fall, Robinson broke her femur.

26 *Robinson*, 156 Idaho at 238, 322 P.3d at 320. There was no evidence in the *Robinson* decision that
27 the landlord had a contractual duty under the lease, or a statutory duty to install railings and the
28 court ruled he had not assumed a duty. In fact, the court further observed:

29 In the case at hand, Robinson presented evidence that the landlord had previously
30 made repairs to the carpet and the dormer door of the apartment. Although
31

1 Robinson maintains this established the landlord had a duty to make general
2 repairs to the premises, this does not equate to a duty to make the premises safe.
3 The condition at issue here—a recessed dormer—was not subject to the type of
4 repair or maintenance that Robinson contends the landlord was responsible for.
5 Rather, it was a feature of the property. Robinson does not predicate her claim on
6 the deficiency of any repair actually done by the landlord. Therefore, the landlord's
7 repair of the carpet and door do not establish a duty owed to Robinson, nor do they
8 create a genuine issue of material fact that would preclude summary judgment.

9 *Robinson*, 156 Idaho at 241, 322 P.3d at 323 (emphasis added). Finally, the Court of Appeals
10 held:

11 In the context at issue in this case—as between a tenant's social guest and the
12 landlord—the landlord owes a duty [to a tenant's social guest] only to the extent
13 that, if the landlord voluntarily undertakes repairs on the premises, the landlord
14 must exercise reasonable care in performing such repairs. However, the tenant
15 essentially occupies the position of landowner with respect to guests of the tenant.
16 This is because the tenant is the individual in control of the premises during the
17 lease and the tenant has control over the guests hosted in the apartment. There was
18 no evidence the landlord undertook maintenance or repairs of the dormer with
19 respect to any handrails. Thus, there was no duty owed to Robinson.

20 *Id.*

21 In *Harrison*, a business patron (invitee) tripped over a hole in the business' private
22 sidewalk. The patron sued the owner and lessor of the building. In relevant part, the Idaho
23 Supreme Court ruled, as to invitees (as opposed to social guests or licensees), both a landlord and
24 a tenant had a duty of ordinary care. Furthermore,

25 Either a tenant, or a landlord, or both, may be liable to a third party for injuries
26 resulting from negligent repairs or failure to repair. Even in the absence of a
27 specific lease provision, and with no controlling statute requiring him to make
28 repairs, if a landlord voluntarily undertakes repairs he is bound to use reasonable
29 and ordinary care or skill in the execution of the work. Similarly, a tenant or lessee,
30 having control of the premises is deemed, so far as third parties are concerned, to
31 be the owner, and in case of injury to third parties occasioned by the condition or
32 use of the premises, the general rule is that the tenant or lessee may be liable for
33 failure to keep the premises in repair.

34 *Harrison*, 115 Idaho at 596, 768 P.2d at 1329 (citation omitted) (emphasis added).

1 Neither case controls the analysis here. Unlike the landlords in *Robinson* or *Harrison*,
2 Switzer actually had an express contractual duty to repair the water heater.³ See Kipper-First Rate
3 Agreement, ¶39. In fact, arguably, Switzer also had a statutory requirement⁴ to repair it because of
4 the unreasonable risk the water heater carbon monoxide problems posed to harm anyone in that
5 apartment. In fact, the lease prohibited Kipper as the tenant, even if she knew about the dangers,
6 from repairing the water heater. *Id.* Switzer (through First Rate) had the sole authority and
7 responsibility to repair the water heater or to address the carbon monoxide problems. *Id.* Thus, the
8 facts before this Court distinguish it from both *Robinson* and *Harrison*.

9 In the absence of controlling Idaho authority, the Court has examined the relevant
10 restatements. While First Rate contends the Court cannot look to the restatements, Idaho appellate
11 courts have long applied numerous sections in the restatements. Moreover, where there is no
12 Idaho case law directly on point, it is not inappropriate to review and even consider other
13 jurisdiction's case law or the restatements. Therefore, the Court reviewed relevant portions of the
14 restatements and compared their analyses to existing Idaho case law. For example, the relevant
15 restatement potentially applying to these facts provides, in relevant part, as follows:

16 (1) A lessor of land who . . . fails to disclose to his lessee any condition, whether
17 natural or artificial, which involves unreasonable risk of physical harm to persons
18 on the land, is subject to liability to the lessee and others upon the land with the
19 consent of the lessee . . . for physical harm caused by the condition after the lessee
has taken possession, if

20 (a) the lessee does not know or have reason to know of the condition or the risk
21 involved, and

22
23 ³ The Court recognizes that, even if no contractual provision applied, there is also a dispute of fact whether Switzer
had undertaken repairs.

24 ⁴ I.C. § 6-320(3) provides that a landlord is required to maintain the premises in a manner that is not hazardous to the
25 health or safety of the tenant. The Idaho Supreme Court ruled in 2008 that this statute:

26 [E]stablishes a public policy that a landlord must maintain premises in a manner that is not
27 hazardous to the health or safety of the tenant. This Court relied upon I.C. § 6-320(a)(3) when it
28 adopted the rule that a landlord is under a duty to exercise reasonable care in light of all the
29 circumstances. [citations omitted] In essence, this Court concluded that the Legislature established a
policy for landlords to provide safe habitation for their tenants, separate and apart from the issue of
whether one may recover under the specific provisions of I.C. § 6-320. Certainly, it would not be
the public policy of the state to allow landlords to provide hazardous and unsafe premises to their
tenants.

30 *Jesse v. Lindsley*, 149 Idaho 70, 76, 233 P.3d 1, 7 (2008).

1 (b) the lessor knows or has reason to know of the condition, and realizes or
2 should realize the risk involved, and has reason to expect that the lessee will not
3 discover the condition or realize the risk.

4 RESTATEMENT (SECOND) OF TORTS § 358 (1965)(emphasis added). While this specific section has
5 not been considered or applied in Idaho, the Idaho Supreme Court cited an analogous section in
6 the same Restatement, Section 353,⁵ which applies to sellers of land, as authority in *Stephens v.*
7 *Stearns*, 106 Idaho 249, 678 P.2d 41, 48 (1984).⁶ This section is nearly identical to Section 358.

8 Therefore, by analogy, it is reasonable that Idaho courts would follow the same reasoning
9 and apply the RESTATEMENT (SECOND) OF TORTS § 358 to a lessor like Switzer. Contrary to First
10 Rate's arguments, Idaho case law does not preclude the Court from considering restatement
11 sections not adopted or case law from other jurisdictions in the absence of controlling Idaho law.
12 A jury could determine that Switzer (First Rate) knew or should have known about the carbon
13 monoxide problems and the need to replace the water heater and need to install carbon monoxide
14 detectors. Especially given the facts, a jury could determine that Switzer knew this presented an
15 unreasonable risk to anyone in that apartment.

16 Furthermore, numerous other sections in the RESTATEMENT (SECOND) OF TORTS similarly
17 recognize a lessor's duty to disclose or warn lessees of dangerous conditions and to repair those
18 conditions. In fact, several find the failure to warn the tenant or to repair a dangerous condition
19 results in liability to licensees. For example, Section 361 provides in relevant part as follows:

20 A possessor of land who leases a part thereof and retains in his own control any
21 other part which is necessary to the safe use of the leased part, is subject to liability

22 ⁵ The section provides in relevant part:

23 (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural
24 or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the
25 vendee and others upon the land with the consent of the vendee or his subvendee for physical harm
caused by the condition after the vendee has taken possession, if

26 (a) the vendee does not know or have reason to know of the condition or the risk involved, and

27 (b) the vendor knows or has reason to know of the condition, and realizes or should realize the
28 risk involved, and has reason to believe that the vendee will not discover the condition or realize
the risk.

29 RESTATEMENT (SECOND) OF TORTS § 353 (1965).

30 ⁶ "We agree that Koch, as a vendor, did not owe a duty to plaintiff since the lack of the handrail was known to both
31 defendant Stearns, the vendee/landlord, and plaintiff. See RESTATEMENT (SECOND) OF TORTS §§ 352-353 (1965)."
32 *Stephens v. Stearns*, 106 Idaho 249, 256, 678 P.2d 41, 48 (1984).

1 to his lessee and others lawfully upon the land with the consent of the lessee . . .
2 for physical harm caused by a dangerous condition upon that part of the land
3 retained in the lessor's control, if the lessor by the exercise of reasonable care

4 (a) could have discovered the condition and the risk involved, and

5 (b) could have made the condition safe.

6 RESTATEMENT (SECOND) OF TORTS § 361 (1965). The Idaho Supreme Court cited this section as
7 authority in *Keller v. Holiday Inns, Inc.*, 105 Idaho 649, 658-59, 671 P.2d 1112, 1121-22 (Ct.
8 App. 1983) decision reviewed, 107 Idaho 593, 691 P.2d 1208 (1984). Admittedly, the injured
9 parties were invitees.

10 Sections 360-61 provide further exceptions where the lessee is allowed to use
11 parts of the property which are retained under the lessor's control. See also W.
12 PROSSER, HANDBOOK OF THE LAW OF TORTS, § 63, at 405-08 (4th ed. 1971).
13 These exceptions plainly apply to the hallway where the security gates were kept.

14 *Id.* In this case, Switzer expressly retained the right to enter the premises to repair conditions,
15 including the water heater, at any time, and restricted Ms. Kipper's right to either prevent his
16 entry or to repair the water heater herself. See Kipper-First Rate Lease Agreement, ¶39. The
17 comment section to RESTATEMENT (SECOND) OF TORTS § 361 clarifies:

18 a. The rule stated in this Section applies irrespective of whether the lessee or his
19 licensees coming in his right upon that part of the land leased to him, know or
20 could, by the exercise of reasonable care, discover the dangerous condition
21 maintained by the lessor upon that part of the land maintained within his own
22 control. As to the effect of the knowledge of the lessee and others entering upon
23 the land with his consent, see § 360, Comment a.

24 b. The rule stated in this Section applies to the maintenance of walls, roofs, and
25 foundations of an apartment house or office building. It applies also to any other
26 part of the land the careful maintenance of which is essential to the safe use of the
27 rooms or offices or portion of land leased to the various lessees, such as the central
28 heating, lighting, or water system.

29 ***

30 c. If an apartment or office can be safely used only if heat or light is provided and
31 the terms of the lease require the lessor to provide such a service, the lessor is
32 subject to liability for bodily harm caused by a failure to exercise reasonable care
33 to maintain such a service, not only to the lessee but also to those upon the land
34 with the consent of the lessee.

35 *Id.* Likewise, the RESTATEMENT (SECOND) OF TORTS § 357 provides:

1 A lessor of land is subject to liability for physical harm caused to his lessee and
2 others upon the land with the consent of the lessee . . . by a condition of disrepair
3 existing before or arising after the lessee has taken possession if:

4 (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to
5 keep the land in repair, and

6 (b) the disrepair creates an unreasonable risk to persons upon the land which
7 the performance of the lessor's agreement would have prevented, and

8 (c) the lessor fails to exercise reasonable care to perform his contract.

9 RESTATEMENT (SECOND) OF TORTS § 357 (1965). Switzer agreed to keep the premises in repair.

10 The RESTATEMENT (THIRD) OF TORTS § 53 would impose:

11 (c) a duty to disclose to the lessee any dangerous condition that satisfies all of the
12 following:

13 (1) it poses a risk to entrants on the leased premises;

14 (2) it exists on the leased premises when the lessee takes possession;

15 (3) it is latent and unknown to the lessee; and

16 (4) it is known or should be known to the lessor.

17 RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 53 (2012).⁷ Arguably, the dangerous
18 condition pre-existed Kipper's lease.

19 The RESTATEMENT OF PROPERTY, LANDLORD & TENANT, also addresses similar fact
20 patterns.⁸ However, Idaho has not adopted or considered the specific sections identified by the
21 Court or Forbush/Halowell.⁹

22 ⁷ The Idaho Supreme Court relied on a different section in the RESTATEMENT (THIRD) OF TORTS in *Mortensen v.*
23 *Stewart Title Guar. Co.*, 149 Idaho 437, 447, 235 P.3d 387, 397 (2010).

24 ⁸ RESTATEMENT (SECOND) OF TORTS § 357 is a companion section to RESTATEMENT (SECOND) OF PROPERTY, LAND,
& TEN. § 17.5.

25 A landlord is subject to liability for physical harm caused to the tenant and others upon the leased
26 property with the consent of the tenant . . . by a condition of disrepair existing before or arising after
the tenant has taken possession if:

27 (1) the landlord, as such, has contracted by a promise in the lease or otherwise to keep the leased
property in repair;

28 (2) the disrepair creates an unreasonable risk to persons upon the leased property which the
29 performance of the landlord's agreement would have prevented; and

30 (3) the landlord fails to exercise reasonable care to perform his contract.

31 RESTATEMENT (SECOND) OF PROPERTY, LAND, & TEN. § 17.5 (1977). The Restatement continues:

1 The Court finds that these sections are consistent with *Robinson*. In *Robinson*, the
2 landowner/lessor had not contractually obligated himself to repair conditions on the premises. The
3 *Robinson* court relied on and quoted from *Harrison*:

4 Second, tenants are held responsible as if they were the owner with respect to third
5 parties. However, the landlord can still be liable in limited circumstances.
6 [footnote omitted] A landlord generally is not "responsible for injuries to third
7 persons in privity with the tenant which are caused by failure to keep or put the
8 demised premises in good repair."

9 *Robinson*, 156 Idaho at 240, 322 P.3d at 322 (emphasis added). In other words, both the *Robinson*
10 and *Harrison* courts make clear that the circumstances in those cases imposing liability are not the

11 A landlord who leases a part of his property and retains in his own control any other part the tenant
12 is entitled to use as appurtenant to the part leased to him, is subject to liability to his tenant and
13 others lawfully upon the leased property with the consent of the tenant or a subtenant for physical
14 harm caused by a dangerous condition upon that part of the leased property retained in the
15 landlord's control, if the landlord by the exercise of reasonable care could have:

- 16 (1) discovered the condition and the unreasonable risk involved therein; and
17 (2) made the condition safe.

18 RESTATEMENT (SECOND) OF PROPERTY, LAND, & TEN. § 17.3 (1977)

19 A landlord who leases a part of his property and retains in his own control any other part necessary
20 to the safe use of the leased part, is subject to liability to his tenant and others lawfully upon the
21 leased property with the consent of the tenant or a subtenant for physical harm caused by a
22 dangerous condition upon that part of the property retained in the landlord's control, if the landlord
23 by the exercise of reasonable care could have:

- 24 (1) discovered the condition and the risk involved; and
25 (2) made the condition safe.

26 RESTATEMENT (SECOND) OF PROPERTY, LAND, & TEN. § 17.4 (1977)

27 A landlord is subject to liability for physical harm caused to the tenant and others upon the leased
28 property with the consent of the tenant or his subtenant by a dangerous condition existing before or
29 arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the
30 condition and the existence of the condition is in violation of:

- 31 (1) an implied warranty of habitability; or
32 (2) a duty created by statute or administrative regulation.

33 RESTATEMENT (SECOND) OF PROPERTY, LAND, & TEN. § 17.6 (1977).

34 ⁹ Idaho Appellate courts cited with approval to the RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT.
35 See *Stephens v. Stearns*, 106 Idaho 249, 258, 678 P.3d 41, 50 (1984) (relying on the Restatement to determine the
36 modern trend in the law; adopting the modern trend that a landlord is under a duty to exercise reasonable care in light
37 of all of the circumstances); *George W. Watkins Family v. Messenger*, 115 Idaho 386, 389-390, 766 P.2d 1267, 1270-
38 71 (Ct. App. 1988) (citing to RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT §§ 6.1, 6.2 and 16.1
39 (1977)).

1 only circumstances under which a lessor/landlord may be liable. In fact, in a footnote, the
2 *Harrison* court reiterated that circumstances where a landlord could be liable to a third party are
3 not limited to those identified in *Harrison*.

4 While the circumstances where a landlord could be liable to a third party may not
5 exclusively be limited to those set forth in *Harrison*, the quoted passage makes
6 clear that the duty of a landlord to third parties is not one of reasonable care under
7 the circumstances. If it were, there would be no reason to delineate a very narrow
8 set of circumstances illustrating how landlords could be liable.

8 *Id.* (emphasis added).

9 In *Robinson*, the lessor had no contractual obligation to repair the condition, and the tenant
10 knew about the condition. Here, multiple disputes of material facts exist precluding summary
11 judgment to Switzer on the issue of whether Switzer had a duty to warn. In addition, Switzer
12 through his agent, First Rate, did warn Kipper. If a jury finds the warning adequate, Switzer has
13 no liability to Forbush/Halowell for a failure to warn.

14 For example, the comments to section 17.1 of the RESTATEMENT (SECOND) OF PROPERTY,
15 LAND. & TEN. state:

16 The liability of the landlord to those on the leased property with the consent of the
17 tenant is the same as it is to the tenant. Where the landlord has warned the tenant
18 of the existence of any latent defects, he is not responsible for injury to anyone
19 visiting the tenant. However, where the landlord has not warned the tenant, he is
20 subject to liability for injury caused by the latent defect to any social or business
21 guests of the tenant or to members of the tenant's family.

20 RESTATEMENT (SECOND) OF PROPERTY, LAND. & TEN. § 17.1 (1977) (comment g).

21 Therefore, the Court grants reconsideration and denies partial summary judgment to
22 Switzer on this basis. The rest of its previous decision remains unchanged.

23 **B. Sagecrest POA had no duty to Forbush/Halowell and the Court grants summary**
24 **judgment to Sagecrest POA.**

25 Sagecrest POA moved the Court to reconsider its previous order denying summary
26 judgment. Forbush/Halowell, First Rate and Switzer opposed reconsideration.

27 Forbush/Halowell allege Sagecrest POA breached its duty of care owed to
28 Forbush/Halowell, based on their claim that Sagecrest POA failed to repair or replace the water
29 heater located within Apartment 4624 and failed to install carbon monoxide detectors.

1 In order to succeed on their negligence claims against Sagecrest POA, Forbush/Halowell
2 must establish that it had a duty, recognized by law, requiring it to conform to a certain standard
3 of conduct and that it breached that duty. *Robinson*, 156 Idaho at 239, 322 P.3d at 321. They also
4 must establish a causal connection between Sagecrest POA's conduct and their resulting injuries
5 and that they suffered an actual loss or damage. *Id.* Generally, determining whether a duty exists
6 is a question of law. *See, Udy v. Custer Cnty.*, 136 Idaho 386, 389, 34 P.3d 1069, 1072 (2001);
7 *Robinson*, 156 Idaho 237, 322 P.3d 319.

8 Not every person or entity owes a tort duty to everyone else in all circumstances. *Boots ex*
9 *rel. Boots v. Winters*, 145 Idaho 389, 393-94, 179 P.3d 352, 356-57 (Ct. App. 2008) (citing
10 *Turpen v. Granieri*, 133 Idaho 244, 247-48, 985 P.2d 669, 672-73 (1999). "Absent unusual
11 circumstances, a person has no duty to prevent harm to another, regardless of foreseeability."
12 *Beers v. Corp. of Pres. of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 686, 316
13 P.3d 92, 98 (2013).

14 The Court finds, as a matter of law, Sagecrest POA owed no duty to Forbush/Halowell.
15 The Court reconsiders its earlier decision and grants its summary judgment based on the
16 following.

- 17 1. **The CC&Rs do not authorize Sagecrest POA to replace the water heater or**
18 **install carbon monoxide detectors in apartment 4624 or to order their**
19 **installation or replacement even in an emergency.**

20 The Sagecrest complex CC&R's clearly define both Sagecrest POA's responsibilities and
21 authorities and the individual building owner's responsibilities and authorities. Covenants, like
22 these CC&Rs, that restrict the uses to which a party may use his or her property are valid and
23 enforceable. *Nordstrom v. Guindon*, 135 Idaho 343, 17 P.3d 287, 290 (2000). In construing a
24 restrictive covenant, the Court generally applies the same rules of construction as are applied to
25 any contract. *Id.* Whether covenants are ambiguous is a question of law for the Court. *Id.*
26 Furthermore, where a covenant is clear and unambiguous, its interpretation is also a question of
27 law. *Id.* In this case, the Court finds that the covenants at issue, are clear and unambiguous; thus,
28 their construction is a question of law.

29 Applying the clear language of the CC&Rs, the Court finds that only the individual Four
30 Plex owners control their respective Four Plexes. Only the owners are responsible for maintaining
31

1 and repairing the interior areas of their respective Four Plexes and individual residential units.
2 CC&Rs, ¶3.3A. They are further responsible, to a limited extent, for exterior areas they control,
3 like the windows on their respective units. Thus, only Switzer can determine whether a new water
4 heater is installed or repaired or whether carbon monoxide detectors are installed. Under the
5 CC&Rs, Sagecrest POA only controls the exterior areas and is responsible for exterior
6 maintenance and repair only. See CC&Rs, ¶3.3.

7 Forbush/Halowell and First Rate argue that in an emergency, Sagecrest POA had authority
8 to enter the individual apartments. However, construing the following excerpts from the CC&Rs
9 makes clear that is not the case:

10 3.3 Maintenance of Lots and Four Plexes.

11 A. The Association shall maintain the following:

- 12 1. The following portions of the exterior of each Four Plex: ...
13 including the entry way, exterior stairs, railings and decks, and
14 roofs.
- 15 2. All Sidewalks on the Property.
- 16 3. All landscaping on the Property, including, without limitation, all
17 grass areas, shrubs, trees and bushes that are on Residential Lots
18 and the Recreational Center Lot, and all planters, whether they are
19 on Residential Lots or in the Common Areas.
- 20 4. Drainage Facilities, including the Drainage Lot.
- 21 5. The Common Areas.
- 22 6. Any perimeter fence.
- 23 7. The main lines, service lines, valves, and sprinkler heads of the
24 PUIS [pressurized irrigation system] on the Property to the extent
25 that they are not maintained by the Nampa Irrigation District.

26 B. The Owner shall maintain the following:

- 27 1. The following portions of the exterior of the each Four Plex:
28 windows, doors, exterior air conditioning units and all other
29 exterior maintenance not performed by the Association; and
- 30 2. The entire interior of the Four Plexes, including but not limited
31 to flooring, ceilings, walls and wall coverings, appliances,
32 plumbing and plumbing fixtures, electrical system and fixtures,
all interior components of the heating and air conditioning
system.

1 3.5 Owner's Right with Respect to Interiors: Each Owner shall have the
2 exclusive right to ..., repair, ... or otherwise maintain, ... the interior portions of
3 their Four Plex,

4 3.6 Easements for Access for Repair, Maintenance: The Association is hereby
5 granted an irrevocable easement for purposes of access to and upon each
6 Residential Lot and Four Plex, during reasonable hours and as necessary for the
7 maintenance and repair of the Residential Lot and Four Plex thereon.

8 ***

9 3.8 Failure of Owner to Maintain such Owner's Residential Lot or Four Plex:
10 In the event the Owner of any Residential Lot improved with a Four Plex shall fail
11 to maintain any portion of such Owner's Residential Lot that Owner is
12 responsible to maintain, in a manner reasonable [sic] satisfactory to the Board,
13 after approval by vote of at least sixty percent (60%) of the members of the Board
14 present and voting and subject to such Owner's right to notice and a hearing before
15 the Board, the Association may, through its agents and employees, enter upon the
16 Residential Lot or Four Plex and repair, maintain and restore the Residential Lot,
17 or the Four Plex.

18 ***

19 ARTICLE IX.

20 RESERVED EASEMENTS

21 ***

22 9.3 Maintenance Easement: An easement is hereby reserved to Declarant
23 [Sagecrest Development LLC or its successor] and any member of the Board of
24 Directors [of the Sagecrest POA] or Manager, and their respective officers, agents,
25 employees and assigns, upon, across, over, in and under the Property and a right to
26 make such use of the Property as may be necessary or appropriate to make
27 emergency repairs or to perform the duties and functions which the Association is
28 obligated or permitted to perform, including but not limited to the following: the
29 right to enter upon any Residential Lot and the exterior of any Four Plex for the
30 purpose of performing repairs and maintenance to such Residential Lot or Four
31 Plex, as provided herein; and the right to enter upon any Residential Lot to perform
32 landscaping services, and to install, repair and maintain the PUIS [pressurized
33 irrigation system].

34 CC&Rs (emphasis added). The CC&Rs define the terms "Four Plex," "Residential Lots" and
35 "Property," the CC&Rs define "Four Plex" as "a residential building on each Residential Lot of
36 the Property that is comprised of four separate single family residential units." See CC&Rs,
37 Article II, Definitions. They define "Residential Lots" as "all Lots on the Multi Family Portion of
38 the Plat, except the Recreational Center Lot, the Driving and Parking Lot, and the Drainage Lot."
39 Id. "Property" is defined as "the real property described in Exhibit A." Id.

1 None of the provisions permit Sagecrest POA to repair or replace or order First Rate to
2 repair or replace anything inside the Four Plex residential units. Sagecrest POA can only make
3 emergency repairs on exterior areas; i.e., the Residential Lot or the exterior of the Four Plex. See
4 CC&Rs, ¶¶3.8 and 9.3. It can perform "repairs and maintenance to such Residential Lot or Four
5 Plex." *Id.* The definitions of Residential Lot and Four Plex clearly describe only exterior areas.

6 B. The Owner shall maintain the following:

- 7 1. The following portions of the exterior of the each Four Plex: windows,
8 doors, exterior air conditioning units and all other exterior maintenance not
9 performed by the Association

10 CC&Rs, ¶3.3 (B) (emphasis added). Paragraph 3.8 reads, in relevant part, as follows:

11 3.8 Failure of Owner to Maintain such Owner's Residential Lot or Four Plex:
12 In the event the Owner of any Residential Lot improved with a Four Plex shall fail
13 to maintain any portion of such Owner's Residential Lot that the Owner is
14 responsible to maintain, in a manner reasonable [sic] satisfactory to the Board,
15 after approval by vote of at least sixty percent (60%) of the members of the Board
16 present and voting and subject to such Owner's right to notice and a hearing before
the Board, the Association may, through its agents and employees, enter upon the
Residential Lot or Four Plex and repair, maintain and restore the Residential Lot,
or the Four Plex.

17 CC&Rs, ¶3.8 (emphasis added). When ¶3.8 is read together with ¶3.3 (B), it is clear that any
18 emergency repairs Sagecrest POA is authorized to make are limited to the areas exterior to the
19 apartments and only then by sixty percent vote.

- 20 2. The Court wrongly held that the CC&Rs, ¶6.7(A)5(e), authorized the
21 Sagecrest POA to interfere with First Rate's management of the carbon
22 monoxide issues.

23 On October 30, 2014, the Court orally ruled that CC&Rs, ¶6.7(A)5(e), authorized the
24 Sagecrest POA to control First Rate's management of the carbon monoxide issues. The Court
25 erred. When read as a whole, the CC&Rs do not authorize Sagecrest POA to interfere with First
Rate's management of individual owner's Four Plex. That section reads as follows:

26 Safety and Security: Each owner and occupant of a Four Plex unit, and their
27 respective guests and invitees, shall be responsible for their own personal safety
28 and the security of their property in the Village. The Association may, but shall not
29 be obligated to maintain or support certain activities within the Property designed
30 to enhance the level of safety or security which each person provides for himself
31 and his property. Neither the Association nor Declarant shall in any way be
considered insurers or guarantors of safety or security within the Property, nor

1 shall either be held liable for any loss or damage by reason of failure to provide
2 adequate security or ineffectiveness of security measures undertaken.

3 CC&Rs, ¶6.7(A)5(e).

4 First, the plain language places the responsibility upon owner-lessors, lessees, and lessee
5 guests for their own personal safety and security of their property. Second, while Sagecrest POA
6 may augment safety and security, it does not insure or guarantee that safety and security and is not
7 liable for any loss or damage caused by the inadequacy of those measures.

8 As noted by Sagecrest POA, the CC&Rs cannot and do not give it authority to take any
9 action within the individual unit interiors because those units are privately owned and the owner
10 has exclusive authority. See CC&Rs, ¶3.5. Only the unit owner can impart that authority to
11 Sagecrest POA. *Id.* There is no evidence that ever happened.

12 3. The First Rate-Sagecrest POA agreement did not authorize First Rate to
13 replace the water heater or install carbon monoxide detectors in apartment
14 4624 or to order their installation or replacement without the Owner
Switzer's consent.

15 Sagecrest POA contracted with First Rate to manage the day-to-day exterior maintenance
16 and repair. The First Rate-Sagecrest POA Agreement can only give First Rate the authority and
17 control the Sagecrest POA has, which does not include the apartment interior. In addition to the
18 First Rate-Sagecrest POA Agreement, First Rate also contracted with Switzer, the owner of
19 Building 46, to manage and maintain Switzer's apartment interiors, including Apartment 4624.
20 The parties frequently confuse this division of authority because both Switzer, the Owner of
21 Apartment 4624, and Sagecrest POA contracted with First Rate to act as their agent. However,
22 they forget that First Rate can only act within each principle's respective authority. Moreover, the
23 Sagecrest POA president, Kalsbeek, as an owner, also individually contracted with First Rate as
24 well to act as his individual agent.

25 The First Rate-Switzer Agreement allowed First Rate to make ordinary repairs and
26 replacements reasonably necessary to preserve and maintain the exterior and interior of Switzer's
27 units in an attractive condition and state of good repair. By agreement, First Rate did not need
28 Switzer's approval to replace or repair interior things when the cost was below \$250.00.
29 However, First Rate needed Switzer's approval for any actions, including repairs, exceeding
30 \$250.00.

1 4. **Tenant Kipper is not a third party beneficiary of the Sagecrest POA-First**
2 **Rate Agreement, Paragraph 3.4.**

3 Switzer also argues the tenant, Kipper, is the third party beneficiary of the Sagecrest POA-
4 First Rate Agreement, ¶3.4, creating dispute of fact regarding privity of the contract precluding
5 summary judgment. The Court disagrees.

6 Idaho Code § 29-102 provides that "[a] contract, made expressly for the benefit of a third
7 person, may be enforced by him at any time before the parties thereto rescind it." However, the
8 RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) provides:

9 (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a
10 promise is an intended beneficiary if recognition of a right to performance in the
11 beneficiary is appropriate to effectuate the intention of the parties and either

12 (b) the circumstances indicate that the promisee intends to give the
13 beneficiary the benefit of the promised performance.

14 (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

15 In addition, Idaho case law clearly establishes, that "[t]he test for determining a party's
16 status as a third-party beneficiary ... is whether the agreement reflects an intent to benefit the third
17 party." *Idaho Power Co. v. Hulet*, 140 Idaho 110, 112, 90 P.3d 335, 337 (2004). The third party
18 must show "that the contract was made for his direct benefit, or as sometimes stated primarily for
19 his benefit, and that it is not sufficient that he be a mere incidental beneficiary." *Dawson v.*
20 *Eldredge*, 84 Idaho 331, 337, 372 P.2d 414, 418 (1962) (quoting *Sachs v. Ohio Nat'l Life Ins. Co.*,
21 148 F.2d 128, 131 (7th Cir.1945)). "[T]he contract itself must express an intent to benefit the
22 third party." *Adkison Corp. v. American Bldg. Co.*, 107 Idaho 406, 409, 690 P.2d 341, 344
23 (1984). *Fenwick v. Idaho Dept. of Lands*, 144 Idaho 318, 323, 160 P.3d 757, 762 (2007); *see*
24 *also Partout v. Harper*, 145 Idaho 683, 688, 183 P.3d 771, 776 (2008).

25 Therefore, the Court first examines the Sagecrest POA-First Rate Agreement to determine
26 whether it indicates that when the parties entered it, they intended it be for Kipper's benefit. The
27 Sagecrest POA-First Rate Agreement, ¶3.4, provides:

28 **3.0 DUTIES OF AGENT [First Rate]**

29 3.4 Take such action as AGENT deems reasonable and appropriate in the event
30 of any emergency brought to AGENT's attention which may result in damage to
31 the property or cause injury to tenants and occupants of the Property.

1 Notwithstanding this authority, it is understood and agreed that AGENT will if
2 at all possible, confer immediately with the President, or other authorized
3 officer of the ASSOCIATION regarding all emergency repairs in excess of
\$300.00 without first obtaining approval of the ASSOCIATION.

4 There is nothing in the agreement that indicates that Kipper or any other tenant was an
5 intended beneficiary. The agreement clearly indicates that it is for the mutual benefit of the
6 Sagecrest POA and First Rate. There is no dispute of fact.

7 **5. Sagecrest POA did not modify its agreement with First Rate.**

8 Forbush/Halowell, First Rate and Switzer argue that Sagecrest POA modified the
9 Sagecrest POA-First Rate Agreement, either orally or by conduct, changing its duties to Sagecrest
10 tenants. They argue that Sagecrest POA board's actions assumed responsibility for "global" issues
11 affecting the entire complex. The Court disagrees. In making its argument, Switzer identified
12 Sagecrest POA-First Rate Agreement, ¶3.4. That provision provides as follows:

13 **3.0 DUTIES OF AGENT** [First Rate]

14
15 3.4 Take such action as AGENT deems reasonable and appropriate in the event
16 of any emergency brought to AGENT's attention which may result in damage to
17 the property or cause injury to tenants and occupants of the Property.
18 Notwithstanding this authority, it is understood and agreed that AGENT will if
19 at all possible, confer immediately with the President, or other authorized
officer of the ASSOCIATION regarding all emergency repairs in excess of
\$300.00 without first obtaining approval of the ASSOCIATION.

20 However, Switzer's argument completely ignores the fact that this agreement with First Rate
21 cannot enlarge the sphere of Sagecrest POA's authority and responsibility as defined in the
22 CC&Rs. This section must be construed within the entirety of the agreement.

23 If the terms of a contract are clear and unambiguous, the interpretation of the contract's
24 meaning is a question of law. *E.g., Ada County Assessor v. Taylor*, 124 Idaho 550, 553, 861 P.2d
25 1215, 1218 (1993). If, on the other hand, the terms of a contract are ambiguous, the interpretation
26 of that contract's meaning is a question of fact. *Id.; Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d
27 1342, 1346 (1992). "The initial inquiry into whether a ... legal instrument is ambiguous presents a
28 legal question, over which this court exercises free review." *Chubbuck v. City of Pocatello*, 127
29 Idaho 198, 201, 899 P.2d 411, 414 (1995); *see also Dr. James Cool, D.D.S. v. Mountainview*
30 *Landowners Co-op. Ass'n, Inc.*, 139 Idaho 770, 772, 86 P.3d 484, 486 (2004). "An instrument

1 which is reasonably subject to conflicting interpretation is ambiguous.” *Latham v. Garner*, 105
2 Idaho 854, 858, 673 P.2d 1048, 1052 (1983). “The legal effect of an unambiguous written
3 document must be decided by the trial court as a question of law.” *Id.* at 857, 673 P.2d at 1051.

4 In order to determine whether the contract between Sagecrest POA and First Rate is
5 ambiguous, this Court first determines whether the terms of that contract are reasonably
6 susceptible to conflicting interpretations. *Id.* When read as a whole, the Court finds this contract is
7 clear and unambiguous and is not susceptible to conflicting interpretations. Both First Rate and
8 Switzer remove isolated sections out of the agreement and attempt to infuse them with tortured
9 constructions.

10 The interpretation and legal effect of an unambiguous contract are questions of law. *See*
11 *Hanks v. Sawtelle Rentals, Inc.*, 133 Idaho 199, 202–03, 984 P.2d 122, 125–26 (1999); *First*
12 *Security Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 791, 964 P.2d 654, 658 (1998). In
13 construing a written instrument, the Court must consider it as a whole and give meaning to all
14 provisions of the writing to the extent possible. *See Magic Valley Radiology Associates, P.A. v.*
15 *Professional Business Services, Inc.*, 119 Idaho 558, 565, 808 P.2d 1303, 1310 (1991).

16 In construing this section, it is clear that it is not enlarging Sagecrest POA’s authority; it
17 simply authorizes and imposes a duty on First Rate to take emergency action (up to \$300 without
18 approval) to address any problem that could damage the exterior and common areas of the
19 property to cause injury to the tenants or others. But this authority is clearly limited to those areas
20 controlled by Sagecrest POA. It does not authorize actions within the interior of the residential
21 units in the individually owned Four Plexes. It does not change the clear division of
22 responsibilities and authorities between the individual owners and Sagecrest POA.

23 In an attempt to avoid its responsibilities, First Rate tries to argue that Sagecrest POA
24 modified ¶3.4. For example, Tony Drost, First Rate president, testified:

25 Q. Do you believe Section 3.4 changed in such a way that you did not have to
26 confer with Mr. Kalsbeek if at all possible but were required to go through him
27 with regard to health and safety in emergent situations?

28 A. Yes, sir.

29 Q. Do you believe that Section 3.4 was amended – whether it’s through
30 emails, oral communications by Mr. Kalsbeek, written communications by Mr.
31 Kalsbeek – that if there was a disagreement with regard to health and safety in an

emergent situation, that Kalsbeek's decision would override First Rate's recommendations?

A. I believe it's safe to say that it prevailed in most cases, but I don't know if it prevailed in all cases.

Drost Dep. pg. 236 and 334.

However, these arguments ignore the clear language of the agreement precluding such modifications. The Sagecrest POA-First Rate agreement specifically provides in relevant part as follows:

10.0 ENTIRE AGREEMENT

This AGREEMENT contains the entire agreement between the parties hereto, and supersedes all prior negotiations and agreements, whether written or oral. No modifications or amendments hereto shall be of any force or effect, unless in writing and executed by both AGENT and ASSOCIATION.

Sagecrest POA-First Rate Agreement, ¶10.0 (emphasis added). Neither party could modify the contract without placing it in writing and First Rate could not unilaterally modify the contract. *See, City of Meridian v. Petra Inc.*, 154 Idaho 425, 436, 299 P.3d 232, 243 (2013) (An agreement that allows for modifications only in writing signed by both parties can only be modified by agreement signed by both parties.)

Neither Switzer nor First Rate produced any written agreement to modify the Sagecrest POA-First Rate Agreement. Thus, there is no modification that complies with the express terms of the agreement: *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 717, 330 P.3d 1067, 1075 (2014); *Watkins Co., LLC v. Storms*, 152 Idaho 531, 535-36, 272 P.3d 503, 507-08 (2012).

While the Idaho Supreme Court recognizes "The fact of agreement may be implied from a course of conduct in accordance with its existence and assent may be implied from the acts of one party in accordance with the terms of a change proposed by the other." *Ore-Ida Potato*, 83 Idaho at 296, 362 P.2d at 387. However, without a meeting of the minds, the conduct of the parties cannot establish a modification. *Watkins*, 152 Idaho at 536, 272 P.3d at 508. The *Watkins* case is instructive. As the Supreme Court observed:

In *Watkins*, a lease between the parties provided that "each party specifically waives the right to a jury trial," and contained a clause dictating that the lease

1 could only be modified by a writing signed by both parties. 152 Idaho at 535, 272
2 P.3d at 507. Despite this, when a dispute arose, both parties demanded a jury trial
3 in their pleadings. *Id.* Then, four weeks before trial, the plaintiffs filed a motion to
4 enforce the jury-waiver clause. *Id.* The defendants argued that the clause had been
5 modified by mutual consent through each party's conduct of requesting a jury trial.
6 *Id.* This Court upheld the district court's conclusion that there was no modification
7 of the lease and that the jury-waiver clause was enforceable. *Id.* We noted first that
8 there was no modification that complied with the lease as there was no written
9 agreement to modify signed by both parties. *Id.* Further, we explained that,
10 regardless of the parties' conduct, there must be a meeting of the minds as to the
11 proposed modification. *Id.* at 536, 272 P.3d at 508. Without any evidence that the
12 parties mutually agreed to modify the jury-waiver clause of the lease, their
13 independent conduct was insufficient to demonstrate modification. *Id.*

14 *Pocatello Hosp., LLC v. Quail Ridge Med. Investor, LLC*, 156 Idaho 709, 717-18, 330 P.3d 1067,
15 1075-76 (2014) (emphasis added).

16 Here, like *Watkins* and *Pocatello Hospital*, the Sagecrest POA-First Rate Agreement
17 contained a provision which stated that "No modifications or amendments hereto shall be of any
18 force or effect, unless in writing and executed by both AGENT and ASSOCIATION." The parties
19 never executed and never modified or amended the agreement between them in writing. Thus, as
20 in *Watkins* and *Pocatello Hospital*, there was no modification that complied with the Sagecrest
21 POA-First Rate Agreement's express amendment terms.

- 22 6. There is no evidence that Sagecrest POA assumed a duty to replace or repair
23 the water heaters in Apartment 4624, to install carbon monoxide detectors or
24 to warn the tenants about carbon monoxide issues.

25 Forbush/Halowell, Switzer and First Rate argue that Sagecrest POA assumed a duty
26 through its actions. While the Court initially ruled this was a question of fact for the jury, the
27 Court erred. Sagecrest POA had no control over the interior of Apartment 4624 and thus had no
28 duty to Forbush/Halowell.

29 In this case, no party alleges, and the undisputed facts fail to support, the existence of a
30 special relationship between Sagecrest POA and Forbush/Halowell. *Beers*, 155 Idaho at 686, 316
31 P.3d at 98; *See also Rees v. State, Dep't of Health & Welfare*, 143 Idaho 10, 15 (2006) ("An
32 affirmative duty to aid or protect arises only when a special relationship exists between the
33 parties."). Instead, Forbush/Halowell, First Rate and Switzer contend Sagecrest POA voluntarily
34 assumed a duty to perform a safety related act – to install carbon monoxide detectors and repair or

1 replace the water heaters. It is true, a party's actions can create a duty as the Supreme Court
2 recognizes.

3 A duty arises in the negligence context when one previously has undertaken to
4 perform a primarily safety-related service; others are relying on the continued
5 performance of the service; and it is reasonably foreseeable that legally-recognized
harm could result from failure to perform the undertaking.

6 *Beers v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 316
7 P.3d 92, 100 (2013) (quoting *Baccus v. Ameripride Servs., Inc.*, 145 Idaho 346, 351, 179 P.3d
8 309, 314 (2008)). However, no one presented any evidence that Sagecrest POA undertook the
9 duty to warn tenants about carbon monoxide issues, or repair or replace the water heaters.
10 Moreover, there is no evidence that Kipper (the tenant in Apartment 4624) or anyone else relied
11 on Sagecrest POA to install carbon monoxide detectors or to repair or replace the water heaters.

12 In order to preclude summary judgment to the Sagecrest POA, Forbush/Halowell, Switzer
13 and First Rate must present some evidence creating a dispute of material fact that Sagecrest POA
14 undertook a duty and that Kipper, or even some other party, relied on Sagecrest POA to provide
15 and install carbon monoxide detectors or new water heaters. Other than argument, no party
16 presented any evidence that Sagecrest POA represented to anyone, including First Rate, Switzer
17 or Kipper, that it, and not the owners, would provide and install carbon monoxide detectors or
18 new water heaters. In fact, the only evidence is that Kipper did not even know who or what
19 Sagecrest POA was.¹⁰ The only evidence in the record is that both Sagecrest POA and First Rate
20 always recognized that First Rate needed Switzer's consent, as the owner of the unit, to repair or
21 replace the water heaters if the cost was over \$250.

22 On October 31, 2011, Switzer attended a Sagecrest POA Annual Meeting by telephone.
23 During that annual meeting the "smell of gas and water heater replacement" was discussed with
24 all of the owners, and Switzer learned about recommendations an engineer made after inspecting
25 the units. More particularly, the minutes provide as follows:
26

27
28 ¹⁰ Forbush/Halowell argue Ms. Kipper relied on Sagecrest POA because First Rate prepared the warning placed on
29 Apartment 4624. At the hearing, they claimed the warning indicated it was from Sagecrest POA. This claim is not
30 true. First Rate printed the warning on letterhead titled "Sagecrest Apartments." Nothing on the warning suggests it is
31 from or associated with Sagecrest POA. In fact, Kipper herself testified that she did not know anything about a
Sagecrest POA or any of its officers. She only dealt with First Rate.

1 X. NEW BUSINESS:

2 ***

3 B. WATER HEATER AND A/C PROBLEMS=PRV'S:

4 President Jon Kalsbeek stated that the four part program has removed the
5 flooding problems. However, not all owners have had this work performed
6 and as a result, several floods occurred. Jon requested that FRPM [First
7 Rate] compile a list of all units that have had the work done to include an
8 updated price. As a reminder the proactive repairs which to date have
9 prevented any floods and the subsequent major costs associated to it are to:

- 10 1. Filters provided by POA and changed on a regular schedule
- 11 2. Install Freeze states in each unit
- 12 3. Install Pressure Regulator Valve per building
- 13 4. Replace Expansion tanks

14 C. SMELL OF GAS AND WATER HEATER REPLACEMENT

15 The POA hired a [sic] HVAC Engineer to inspect the units and make a
16 recommendation at a cost of \$1,000. The engineer's recommendation was
17 to:

- 18 1. Increase the fresh air intakes in wall for all floor plans
- 19 2. Replace the existing water heater with a different manufacturer that
20 had side vents for floor plans A and B and C units as they fail for
21 other reasons
- 22 3. Add louvers to the closet doors for C floor plans

23 President Kalsbeek requested FRPM [First Rate] to send a report
24 showing which units have had the above work done. The list should
25 show which units have had the work done as well as the name of the
26 new water heater and current cost to include parts and labor.

27 It was requested that the Sagecrest Resident Managers test for CO at the
28 time they are replacing the filters and notify the appropriate owner should
29 there be concerns to discuss options.

30 Upon turnovers, Resident Managers are to encourage owners to replace the
31 smoke detectors near the water heater area with a dual CO and smoke
32 detector that hooks up to the current electrical plug with a battery as back
33 up.

It was requested that FRPM send out a master list showing exactly which units
have had what work done on them. Additionally, they would like a list of pricing
and manufacturer and model number for all major appliances (refrigerators, stove,
microwaves, dishwashers, washer and dryers) as some owners state that they were
able to find them cheaper, which should not be the case. This list should include

1 the pricing for Freeze stats [sic], PRV, expansion tank, water heater replacement,
2 fresh air vent replacement, installation of louvers on closet doors, and cost of
3 CO/smoke detectors. Also, include the cost to install the A/C condenser locks to
protect from huffing?

4 Sagecrest POA Meeting, dated October 31, 2011. On November 9, 2011, First Rate employee,
5 Tara Gaertner, emailed Sagecrest Four Plex owners, including Switzer, regarding a number of
6 maintenance matters, including water heater and carbon monoxide concerns in several buildings
7 at Sagecrest. That email provided, in relevant part, as follows:

8 Attention Owners: . . .

9 ***

10 Below are the recommendations from the HVAC engineer to solving the CO
problem in the units.

11 A. Increase the fresh air intakes for all floor plans by adding louvers to
12 the closet doors for ALL floor plans. \$187.50 per unit.

13 B. Replace existing water heater with one that has side vents for ALL
14 floor plans. \$650.

15 C. Replace the smoke detectors with CO/Smoke detector combination
16 sensor. \$62.48 per unit.

17 All of these recommended repairs are to help prevent the possibility of carbon
monoxide entering the unit. These recommendations come from a report obtained
18 by your association from a HVAC engineer evaluation.

19 Again, this work is highly recommended. Please let me know what you would
like to have done and I can get that scheduled as soon as possible.

20 (Emphasis added.) Contrary to First Rate's present argument, First Rate always recognized it
21 needed Switzer's consent. In fact, Switzer replied by email that same day, in relevant part, as
22 follows:

23 11-9-11

24 Hi Tara,

25 I did not know we had a CO problem in the units. Would you let me know if
26 my water heaters have a pressure release valve? The older models don't, but newer
27 ones usually come with it. I'm not worried about a water heater with side vents due
to cost.

28 I appreciate the heads up on these preventative maintenance measures. I'm trying
29 to weigh costs vs benefits. Any help you can offer is appreciated. What is the
30 general consensus among the other owners?

1 Gaertner replied to Switzer's email stating "(a)ll of your water heaters checked in good during the
2 carbon monoxide detecting. We will be doing that again in November. I will let you know if there
3 are any problems."

4 Those opposing summary judgment contend Sagecrest POA assumed the duty because
5 Sagecrest POA hired an engineering firm and helped First Rate staff to develop carbon monoxide
6 testing procedures. However, hiring an engineering firm to investigate the problem in order to
7 provide information to the individual owners is not evidence it was assuming a duty to repair or
8 replace the water heaters or to install carbon monoxide detectors. Hiring an engineer to advise the
9 owners does not expand Sagecrest POA clearly defined authorities and responsibilities. Moreover,
10 helping First Rate staff to develop proper procedures after First Rate employee Gaertner failed to
11 accurately test for carbon monoxide in several units¹¹ does not create a duty to repair or replace
12 the water heaters or to install carbon monoxide detectors inside the units.

13 As the *Beers* court held, an assumed duty is limited to the duty actually assumed – it does
14 not create a duty beyond that act actually undertaken. It is limited in scope. As observed by
15 Sagecrest POA, "the act of gathering and providing information to decision-makers is not
16 assumption of a duty with regards to repairs; those acts are wholly distinct." Defendant Sagecrest
17 Multi-Family Property Owners' Association, Inc.'s Memorandum In Support Of Reconsideration
18 Of POA'S Motion For Summary Judgment, p. 12.

19 "When a party assumes a duty by voluntarily performing an act that the party had
20 no duty to perform, the duty that arises is limited to the duty actually assumed."
21 *Martin v. Twin Falls School Dist. No. 411*, 138 Idaho 146, 150, 59 P.3d 317, 321
22 (2002). Thus, merely because a party acts once does not mean that party is forever
23 duty-bound to act in a similar fashion. A beach-goer may assume a duty to rescue a
24 drowning swimmer in a non-negligent manner by undertaking to do so, but that
25 same beach-goer has no obligation to rescue anyone else. In *Martin*, the school
26 district was not required to post crossing guards at every school crossing even
27 though it had provided crossing guards at certain crossings. Thus, although a party
28 may assume a duty by undertaking to act, that duty is limited to the scope of the
29 undertaking.

30 ¹¹ After her initial alarming test results Intermountain Gas retested those same apartments and determined that she had
31 failed to properly prepare the testing unit and failed to properly test the air.

1 *Beers*, 155 Idaho at 688, 316 P.3d at 100. Thus, even if Sagecrest POA assumed a duty, once
2 completed, that duty extends no further.

3 In addition, Forbush/Halowell must show someone actually relied on the continued
4 performance of the alleged service. *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673
5 (1999) ("The underlying policy [of an assumed duty] arises from a person voluntarily assuming a
6 position, and by filling that position another can reasonably rely on that person to act with
7 reasonable care and provide protection from unreasonable risks of harm"); *Gagnon v. W. Bldg.*
8 *Maint., Inc.*, 155 Idaho 112, 115, 306 P.3d 197, 200 (2013) (A duty can arise from undertaking a
9 duty which induces reliance); *Beers*, 155 Idaho at 688-89, 316 P.3d at 100-01 (Defendants'
10 actions did not reflect the assumption of a duty which the injured party could reasonably rely.)

11 As discussed above, Sagecrest POA had authority to hire an engineering firm to provide
12 information to owners, but it could not authorize repairs or replacement of water heaters inside
13 the Four Plex units. CC&Rs, ¶3.3. First Rate and Sagecrest POA clearly understood this. That
14 understanding never changed even after Sagecrest POA had hired the engineer and provided the
15 information to the owners, First Rate clearly sought approval from Switzer. On July 19, 2011,
16 Kalsbeek, the president of Sagecrest POA, notified other Sagecrest POA officers that:

17 A situation occurred today with a building unit of having a gas smell, this caused
18 the gas company to investigate the situation and found that the original water
19 heaters are considered hazardous by the gas company, this has prompted the need
20 to replace them. FRPM [First Rate] is in the process of working with owners to get
21 these units replaced. More information should be coming from FRPM. The water
heaters are out of warranty.

22 The officers discussed finding out if there had been a recall in a series of emails. In particular, the
23 officers discussed Intermountain Gas's and Express Plumbing's concerns that some of the water
24 heaters had been modified and that tenants had smelled gas. However, they all recognized this
25 was an issue that needed owner decisions.

26 [T]he gas company discussed this [the modifications] with express and does not
27 like that the water heater is being modified. The problem is gas smell and fumes
28 from either the intake being clogged or the exhaust vent clogging. Is this a defect
29 of the water heater or maintenance issue. FRPM is researching this with express
30 plumbing and the gas company. The gas smell and high CO2 readings is what the
31 concern is and why it is being explained as hazardous.

1 These water heaters are over 6 or 7 years old, I believe this is average time of
2 replacement, ours usually go out at 5 to 6 years and if you are really lucky maybe
3 close to 10 years. FRPM is working with each owner that has this brand of
4 water heater --to deal with replacement. This was more of an informational
5 item than anything else. I am trying to get something out to all owners from
6 the board,

7 (Emphasis added.)

8 During that same time frame, First Rate discussed possible actions. On July 20, 2011, First
9 Rate Sagecrest property manager, Tara Gartner, emailed Tony Drost, First Rate president,
10 detailing the problems they had been encountering. After observing that everyone had come to the
11 conclusion that the AO Smith water heaters needed replacement, she wrote:

12 I talked to Jon [Sagecrest POA president Kalsbeek] about this last night, he said
13 since this is an owner expense that I'll have to send something to the owners
14 and have them decide what they want to do. If they want to replace all together
15 at the same time or do them once a month for example. Talking with Express
16 [plumbing] and Intermountain Gas they both said they firmly do not think this
17 should even be an option to the owner, that all AOSmith [sic] water heaters need
18 replaced regardless and they need replaced as soon as possible. If the owners
19 decide they do not wait to then they will have to sign a waiver basically stating that
20 if a tenant dies FRPM, Express & Intermountain Gas is not held liable for it.

21 Intermountain Gas wants to know what is being done NOW to prevent this from
22 happening tomorrow. I am delivering notices to all doors today. Express is going
23 out and buying a Carbon Monoxide tester today and will be out tomorrow testing
24 everyone's water heater to make sure there are no high readings.

25 My question is: Can we make the replacing of the water heaters mandatory or does
26 it have to be an option to the owners.

27 (Emphasis added.) There is no evidence she or anyone else from First Rate asked Sagecrest POA
28 for authority; they went to the owner.

29 On July 29, 2011, Sheila Thomason, First Rate's maintenance supervisor, sent some
30 owners, including Kalsbeek (who was an owner as well), whose water heaters had high carbon
31 monoxide readings an email regarding the water heater and carbon monoxide problems. After
32 explaining what had been happening and the fact First Rate had begun replacing some of the
33 water heaters, she wrote:

34 We are working on long term solutions so the same problem doesn't happen in
35 another 5 years. You will be notified once we have a solid plan. Either way they
36 do need to be replaced for the safety of the tenants. The initial design and

1 location of the water heaters was a poor choice on the builders [sic] end. We are
2 not replacing the water heaters with the same set up but we are looking at altering
3 the environment around them (per code) to guarantee longevity of the new water
4 heaters and safety of the tenants. I fully understand that this is a large expense.
5 Some of you have multiple water heaters that need to be replaced. Unfortunately
6 there isn't [sic] any other options. As owners you are required to provide a safe
7 living environment. Since there are a large amount of water heaters that need to
8 be replaced we are able to get a discount install of \$650 each. They have already
9 purchased 20 water heaters to lock in this rate. . . . We have attempted to collect
10 from the builders [sic] insurance company for multiple issues at the complex but
11 have been unsuccessful.

12 We will be contacting all of the tenants in danger letting them know we have
13 requested the water heater be replaced. . . .

14 I will need a written response from each of you for documentation purposes. I
15 will also follow up with a phone call to ensure you have received and read this
16 email. Please let me know which building you own and if I have approval to
17 replace your water heater(s) listed. If you prefer to use a different vendor I would
18 like that information with an approximate date to inform the tenant. . . .

19 (Emphasis added.) First Rate recognized that only the owner could approve installation of a new
20 water heater. First Rate never asked Sagecrest POA for permission, only the owners. (It does not
21 appear that at that time Switzer's Four Plex apartments had been flagged as having dangerous
22 carbon monoxide levels.)

23 In response, on August 3, 2011, Kalsbeek, an owner of an apartment that had tested high
24 and Sagecrest POA president, wrote First Rate Drost:

25 Just to clarify, the water heaters are interior items of each unit and is therefore
26 an owners [sic] choice on how to handle this situation, not the POA. This makes
27 the costs for inspections and evaluations an owner may request, owner
28 responsibility.

29 This was discussed in depth with FRPM and Sheila.

30 (Emphasis added.) Drost, First Rate's president, agreed:

31 Everyone understands that. As you have requested, FRPM is keeping the POA
32 informed of any major issues happening within the complex. Also, their [sic]
33 certainly will be savings for all if a common action/repair is made. IF [sic] we buy
34 100 water heaters at one time, we should be able to get them at a reduced price. If
35 we do them one at a time, cost [sic] will be more. We're just trying to
36 communicate as best we can.

1 Forbush/Halowell, First Rate and Switzer produced no evidence that at any point First Rate
2 understood that Sagecrest POA had authority to consent to repairing or replacing the water
3 heaters. Likewise, they introduced no evidence that Sagecrest POA assumed a duty to install
4 carbon monoxide detectors in the interior of the apartments. Sagecrest POA never even entered
5 any of those apartments. They presented no evidence Kipper relied on Sagecrest POA.

6 Finally, as Sagecrest POA argues, First Rate did not conduct carbon monoxide testing in
7 all of the Four Plex buildings. In fact, First Rate was not the property manager for all of the owner
8 Four Plexes. If First Rate was acting on behalf of the Sagecrest POA they would have conducted
9 testing in all of the Four Plexes. Therefore, as Sagecrest POA argues, First Rate was only acting
10 on behalf of the owners in the testing. Further, the evidence demonstrated, First Rate only
11 employed maintenance and preventative services for the buildings it managed and only
12 communicated with those owners.

13 Sagecrest POA did not assume any duty to repair or replace the water heater, warn, or
14 install carbon monoxide detectors.

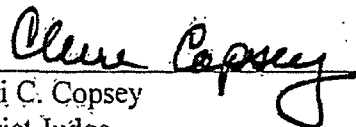
15 CONCLUSION

16 The Court grants Forbush/Halowell's motion to reconsider its Switzer decision, in part,
17 and denies Switzer partial summary judgment on the duty to warn. Whether the warning First
18 Rate issued on Switzer's behalf in 2012 was sufficient to warn Kipper of the carbon monoxide
19 danger posed by the water heater is a question for a jury. The rest of the Court's Switzer decision
20 is not reconsidered.

21 The Court likewise reconsiders its Sagecrest POA decision and grants Sagecrest POA
22 summary judgment.

23 **IT IS SO ORDERED.**

24 Dated this 26th day of May 2015.

25 
26 Cheri C. Copsey
27 District Judge
28
29
30
31

CERTIFICATE OF MAILING

I hereby certify that on this 27th day of May 2015, I mailed (served) a true and correct copy of the within instrument to:

ERIC R. CLARK
CLARK & ASSOCIATES
P.O. BOX 2504
EAGLE, IDAHO 83616

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CHRISTOPHER P. GRAHAM
JONES, GLEDHILL, FUHRMAN, PA
P.O. BOX 1097
BOISE, IDAHO 83701

CHRISTOPHER D. RICH
Clerk of the District Court

By:

Beth Master
Deputy Clerk

NO. _____
A.M. 7:43 FILED P.M. _____

FEB 04 2016

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE
OF IDAHO, IN AND FOR THE COUNTY OF ADA


CHRISTOPHER D. RICH, Clerk
DEPUTY

<p>TRAVIS FORBUSH and GRETCHEN HYMAS, individually and as the natural parents of PRIVATE FIRST CLASS MCQUEN C. FORBUSH, USMC (Deceased), and BREANNA HALOWELL,</p> <p>Plaintiffs,</p> <p>vs.</p> <p>SAGECREST MULTI FAMILY PROPERTY OWNERS' ASSOCIATION <i>et al.</i>,</p> <p>Defendants.</p>	<p>Case No. CV PI 1304325</p> <p>FINAL JUDGMENT</p>
---	--

JUDGMENT IS ENTERED AS FOLLOWS:

IT IS HEREBY ORDERED that all Plaintiffs' causes of action asserted against all parties in the action are dismissed with prejudice.

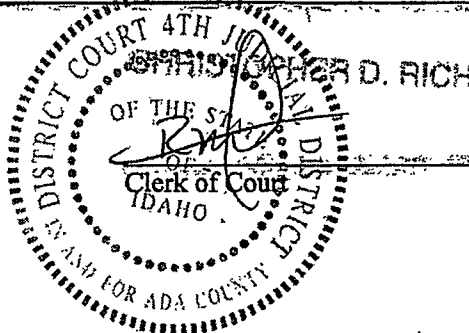
DATED this 3rd day of February, 2016.


HON. CHERI C. COPSEY

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of February, 2016, I caused a true and correct copy of the foregoing to be served via ^{email} ~~US~~ Mail, postage prepaid, to the following:

William A. Fuhrman <u>BFuhrman@idalaw.com</u> Christopher Graham <u>CGraham@idalaw.com</u> JONES GLEDHILL FUHRMAN GOURLEY, P.A. 225 North 9th Street, Suite 820 Post Office Box 1097 Boise, Idaho 83701 Facsimile: (208) 331-1529 <i>For Anfinson Plumbing</i>	M. Michael Sasser. <u>mms@sasseringlis.com</u> Clay Shockley SASSER & INGLIS, P.C. 1902 Judith Lane, Ste. 100 PO Box 5880 Boise, ID 83705 Phone: (208) 344-8474 Fax: (208) 344-8479 <i>For Daniel Bakken</i>
G. Bryan Ulmer Tyson E. Logan Michael F. Lutz THE SPENCE LAW FIRM PO Box 548 Jackson, WY 83001 <i>For the Plaintiffs</i>	Charles F. Peterson, Jr. 913 W. River St., Ste. 400 Boise, ID 82702 <i>For the Plaintiffs</i>



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Ada County Clerk

NO. _____
A.M. _____ FILED P.M. 230

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA
MAR 21 2016

CHRISTOPHER D. RICH, Clerk
By RIC NELSON
DEPUTY

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE
FIRST CLASS MCQUEN C. FORBUSH, USMC
(Deceased), and BREANNA HALOWELL,

Plaintiffs,

vs.

SAGECREST MULTI FAMILY PROPERTY
OWNERS' ASSOCIATION, INC., an Idaho non-
profit corporation, d/b/a SAGECREST MULTI
FAMILY PROPERTY OWNERS"
ASSOCIATION; et al.,

Defendants.

Case No. CV-PI-13 04325

JUDGMENT

JUDGMENT is hereby entered in favor of Defendant Sagecrest Multi-Family Property Owners' Association, Inc., dismissing all of Plaintiffs' claims against Defendant Sagecrest Multi-Family Property Owners' Association, Inc., with prejudice and Plaintiffs shall pay costs to them in the amount of \$19,869.09.

DATED this 21st day of March, 2016.

Cheri C. Copsey
Cheri C. Copsey
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of march, 2016, I caused to be served a true and correct copy of the foregoing document, by the method indicated below, and addressed to the following:

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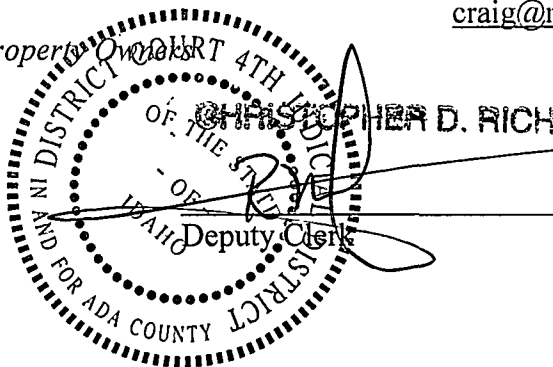
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Ric

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NO _____ FILED _____
A.M. _____ P.M. 5:00

MAR 31 2016

CHRISTOPHER D. RICH, Clerk
By SANTIAGO BARRIOS,
DEPUTY

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Facsimile: (208) 336-7031
Attorneys for Defendant/Respondent Sagecrest
Multi Family Property Owners' Association, Inc.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

TRAVIS FORBUSH and GRETCHEN
HYMAS, individually and as the natural
parents of PRIVATE FIRST CLASS
MCQUEN C. FORBUSH, USMC
(Deceased) and BREANNA
HALOWELL,

Plaintiffs/Apellants,

vs.

SAGECREST MULTI FAMILY
PROPERTY OWNERS' ASSOCIATION,
INC., and JON KALSBECK, Individually
and as President of the Sagecrest
Multi-Family Property Owners'
Association,

Defendants/Respondents.

Case No. CV PI 1304325

**REQUEST FOR ADDITIONAL
DOCUMENTS TO BE INCLUDED IN
THE CLERK'S RECORD**

TO: THE ABOVE NAMED APPELLANTS, THE PARTIES' ATTORNEYS, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN that the Respondents in the above entitled proceeding hereby jointly request pursuant to Rule 19, Idaho Appellate Rules, the inclusion of the following material in the Clerk's Record in addition to that required to be included by the Idaho Appellate Rules and the Notice of Appeal:

1. Defendants Kalsbeek, Arla, Schwab and Meisners Motion to Dismiss Negligence Claim filed on June 12, 2014;
2. Memorandum in Support of Defendants Kalsbeek, Arla, Schwab and Meisner's Motion to Dismiss Negligence Claim filed on June 12, 2014;
3. Defendant Sagecrest Multi Family Property Owners' Association Inc's Motion for Summary Judgment filed on July 24, 2014;
4. Defendant Sagecrest Multi Family Property Owners' Association Inc's Memorandum in Support of Motion for Summary Judgment filed on July 24, 2014;
5. Reply Memorandum in Support of Defendants Kalsbeek, Arla, Schwab and Meisner's Motion to Dismiss Negligence Claim filed on July 24, 2014;
6. Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Reply in Support of Motion for Summary Judgment filed on September 9, 2014;
7. Supplemental Affidavit of Counsel Craig D. Stacey in Support of Defendant's Motion for Summary Judgment and all exhibits filed on September 9, 2014;
8. Order Denying Switzer Summary Judgment filed on September 24, 2014;
9. Defendants Kalsbeek, Arla, Schwab & Meisner's Motion for Summary Judgment filed on October 17, 2014;
10. Memorandum in Support of Defendants Kalsbeek, Arla, Schwab & Meisner's Motion for Summary Judgment filed on October 17, 2014;
11. Affidavit of Jon Kalsbeek filed on October 17, 2014 and all exhibits;
12. Affidavit of David Meisner filed on October 17, 2014;

13. Affidavit of Christopher Schwab filed on October 17, 2014;
14. Affidavit of Jay Arla filed on October 17, 2014;
15. Reply in Support of Motion for Summary Judgment filed December 5, 2014;
16. Affidavit of John M. Howell and all exhibits filed December 5, 2014;
17. Notice of Intent to Reconsider Court's Decision Denying Sagecrest's Summary Judgment filed January 15, 2015;
18. Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Memorandum in Support of Reconsideration of POA's Motion for Summary Judgment filed March 2, 2015;
19. Affidavit of Counsel Michael J. Elia in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Memorandum in Support of Reconsideration of POA's Motion for Summary Judgment and all exhibits filed March 2, 2015;
20. Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Reply to Plaintiffs' Supplemental Brief RE: Defendant Sagecrest POA's Motion for Summary Judgment filed March 9, 2015;
21. Supplemental Affidavit of Counsel Michael J. Elia in Support of Defendant Sagecrest Multi Family Property Owners' Association, Inc.'s Memorandum in Support of Reconsideration of POA's Motion for Summary Judgment and all exhibits filed March 9, 2015;
22. Judgment filed March 9, 2016; and
23. Judgment filed March 21, 2016.

I certify that a copy of this request was served upon the Clerk of the District Court and upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED This 31st day of March, 2016.

BARNUM HOWELL, PLLC

By: 

JOHN M. HOWELL

Attorney for Defendant/Respondent

Jon Kalsbeek

DATED This 31 day of March, 2016.

MOORE & ELIA, LLP

By: 

MICHAEL J. ELIA

Attorney for Defendant/Respondent Sagecrest

Multi Family Property Owners' Association,

Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of March, 2016, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered via email to the addresses indicated below:

G. Bryan Ulmer
Tyson Logan
The Spence Law Firm, LLC
15 S. Jackson St.
PO Box 548
Jackson, WY 83007

☐ US First Class Mail
☒ Fax (307) 733-7290
☐ Email
☐ Hand Delivery

Charles F. Peterson, Jr.
Peterson Lawyers
913 W. River Street
Boise, ID 83702

☐ US First Class Mail
☒ Fax (209) 336-2060
☐ Email
☐ Hand Delivery


John M. Howell

NO. _____
A.M. 9:16 FILED P.M. _____

APR 29 2016
CHRISTOPHER D. RICH, Clerk
By KELLE WEGENER
DEPUTY

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720


(SC No. 44053
(
(
(FORBUSH
(
(vs.
(
(SAGECREST

NOTICE OF TRANSCRIPT LODGED

Notice is hereby given that on April 28, 2016, I lodged a appeal transcript of 182 pages in length in the above-referenced appeal with the District Court Clerk of the County of Ada in the 4th Judicial District.

This transcript contains hearings held on

-October 30, 2014, Motion for Summary Judgment
-January 15, 2015, Motion for Summary Judgment
-April 16, 2015, Motion for Reconsideration


KIM I. MADSEN
Ada County Courthouse
200 West Front Street
Boise, Idaho 83702
(208) 287-7583

KW

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE FIRST
CLASS MCQUEN C. FORBUSH, USMC (Deceased), and
BREANNA HALOWELL,

Plaintiffs-Appellants,

vs:

SAGECREST MULTI FAMILY PROPERTY OWNERS'
ASSOCIATION, INC., and JON KALSBECK, individually
and as President of the Sagecrest Multi Family Property
Owners' Association,

Defendants-Respondents,

and

JAY ARLA, individually and as vice president of the
Sagecrest Multi Family Property Owners' Association;
CHRIS SCHWAB, individually and as secretary of the
Sagecrest Multi Family Property Owners' Association;
DAVID MEISNER, individually and as treasurer of the
Sagecrest Multi Family Property Owners' Association;
FIRST RATE PROPERTY MANAGEMENT, INC., TONY
DROST, individually and as president of First Rate Property
Management, Inc.; SAGECREST DEVELOPMENT, LLC;
PARK CENTER PLUMBING, INC., nka PC PLUMBING,
INC.; WIDGEON MECHANICAL, LLC, nka IDAHO
GEOTHERMAL, LLC; A. O. SMITH, INC.; MATTHEW
E. SWITZER TRUST, and MATTHEW E. SWITZER,
individually and as Trustee of the Matthew E. Switzer Trust;
GOODMAN MANUFACTURING COMPANY, LP;
ANFINSON PLUMBING, LLP; DANIEL BAKKEN,
individually and as employee of Anfinson Plumbing, LLP;
H&H PROPERTIES, LLC; and INTERMOUNTAIN GAS
COMPANY,

Defendants.

Supreme Court Case No. 44053

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of
the State of Idaho in and for the County of Ada, do hereby certify:

CERTIFICATE OF EXHIBITS

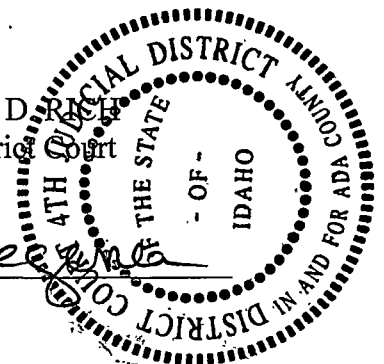
001069

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 29th day of April, 2016.

CHRISTOPHER D. RICH
Clerk of the District Court

By *Wesley*
Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE FIRST
CLASS MCQUEN C. FORBUSH, USMC (Deceased), and
BREANNA HALOWELL,

Plaintiffs-Appellants,

vs.

SAGECREST MULTI FAMILY PROPERTY OWNERS'
ASSOCIATION, INC., and JON KALSBECK, individually
and as President of the Sagecrest Multi Family Property
Owners' Association,

Defendants-Respondents,

and

JAY ARLA, individually and as vice president of the
Sagecrest Multi Family Property Owners' Association;
CHRIS SCHWAB, individually and as secretary of the
Sagecrest Multi Family Property Owners' Association;
DAVID MEISNER, individually and as treasurer of the
Sagecrest Multi Family Property Owners' Association;
FIRST RATE PROPERTY MANAGEMENT, INC., TONY
DROST, individually and as president of First Rate Property
Management, Inc.; SAGECREST DEVELOPMENT, LLC;
PARK CENTER PLUMBING, INC., nka PC PLUMBING,
INC.; WIDGEON MECHANICAL, LLC, nka IDAHO
GEOTHERMAL, LLC; A. O. SMITH, INC.; MATTHEW
E. SWITZER TRUST, and MATTHEW E. SWITZER,
individually and as Trustee of the Matthew E. Switzer Trust;
GOODMAN MANUFACTURING COMPANY, LP;
ANFINSON PLUMBING, LLP; DANIEL BAKKEN,
individually and as employee of Anfinson Plumbing, LLP;
H&H PROPERTIES, LLC; and INTERMOUNTAIN GAS
COMPANY,

Defendants.

Supreme Court Case No. 44053

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have
personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of
the following:

CERTIFICATE OF SERVICE

001071

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

CHARLES F. PETERSON, JR.
ATTORNEY FOR APPELLANT
BOISE, IDAHO

MICHAEL J. ELIA
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

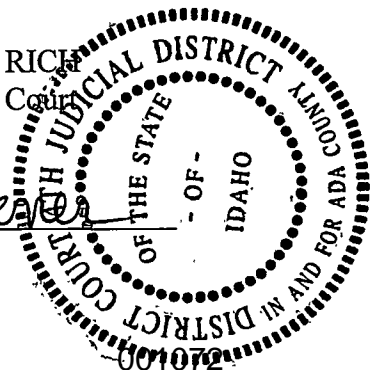
JOHN M. HOWELL
ATTORNEY FOR RESPONDENT
BOISE, IDAHO

Date of Service: APR 29 2016

CERTIFICATE OF SERVICE

CHRISTOPHER D. RICH
Clerk of the District Court

By K. Wegman
Deputy Clerk



IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRAVIS FORBUSH and GRETCHEN HYMAS,
individually and as the natural parents of PRIVATE FIRST
CLASS MCQUEN C. FORBUSH, USMC (Deceased), and
BREANNA HALOWELL,

Plaintiffs-Appellants,

vs.

SAGECREST MULTI FAMILY PROPERTY OWNERS'
ASSOCIATION, INC., and JON KALSBECK, individually
and as President of the Sagecrest Multi Family Property
Owners' Association,

Defendants-Respondents,

and

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Sagecrest Multi Family Property Owners' Association;
CHRIS SCHWAB, individually and as secretary of the
Sagecrest Multi Family Property Owners' Association;
DAVID MEISNER, individually and as treasurer of the
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Management, Inc.; SAGECREST DEVELOPMENT, LLC;
PARK CENTER PLUMBING, INC., nka PC PLUMBING,
INC.; WIDGEON MECHANICAL, LLC, nka IDAHO
GEOTHERMAL, LLC; A. O. SMITH, INC.; MATTHEW
E. SWITZER TRUST, and MATTHEW E. SWITZER,
individually and as Trustee of the Matthew E. Switzer Trust;
GOODMAN MANUFACTURING COMPANY, LP;
ANFINSON PLUMBING, LLP; DANIEL BAKKEN,
individually and as employee of Anfinson Plumbing, LLP;
H&H PROPERTIES, LLC; and INTERMOUNTAIN GAS
COMPANY,

Defendants.

Supreme Court Case No. 44053

CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the
State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in

CERTIFICATE TO RECORD

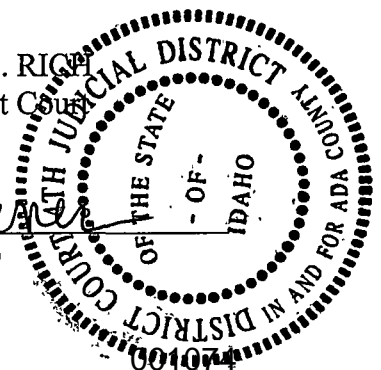
001073

the above-entitled cause was compiled under my direction and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 17th day of March, 2016.

CHRISTOPHER D. RICH
Clerk of the District Court

By K. Wegener
Deputy Clerk



CERTIFICATE TO RECORD